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DECISIONS  
OF THE  
SUPREME COURT  
OF  
NOVA SCOTIA.

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# JUDGES OF THE SUPREME COURT

DURING THE

PERIOD COVERED BY THE DECISIONS PUBLISHED IN THIS VOLUME.

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## *Chief Justice.*

THE HONORABLE SIR WILLIAM YOUNG.

(Appointed 3rd August, 1860.)

## *Judge in Equity.*

THE HONORABLE JAMES W. JOHNSTON.

(Appointed 11th May, 1864.)

## *Assistant Judges.*

THE HONORABLE EDMUND MURRAY DODD.

(Appointed 19th February, 1846.)

THE HONORABLE WILLIAM FREDERICK DESBARRES.

(Appointed 14th November, 1848.)

THE HONORABLE LEWIS MORRIS WILKINS.

(Appointed 14th August, 1856.)

THE HONORABLE JONATHAN McCULLY.

(Appointed 23th September, 1870.)

THE HONORABLE JOHN W. RITCHIE.

(Appointed 23th September, 1870.)

## *Attorneys General.*

THE HONORABLE MARTIN I. WILKINS.

(Appointed November 7th, 1867.)

THE HONORABLE HENRY W. SMITH.

(Appointed 17th April, 1871.)



## ERRATA.

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- Page 4, clause 4, line 4, before "he" insert "did."
- " 18, line 3, for "as a right" read "as of right."
- " 18, " 39, for "some" read "such."
- " 19, " 6, for "unreclaimed" read "unrestricted."
- " 25, " 6, for "him" read "the."
- " 31, " 11, for "in" read "on."
- " 31, " 17, for "on" read "of."
- " 55, " 14, for "tinted" read "tainted."
- " 65, " 4, for "giver" read "grower."
- " 65, " 40, at end of line insert "there was."
- " 107, " 39, after "appealed" insert "from."
- " 113, head-note, line 4, for "plaintiff" read "defendant."
- " 165, line 26, after "sold" insert "by."
- " 173, " 22, for "proffered" read "proved."
- " 176, " 1, for "argued" read "urged."
- " 177, " 8, for "at" read "in."
- " 237, head-note, line 17, after "him" insert "precluded any inference from the clause of the agreement recited as to the existence of a tenancy in common."
- " 289, line 38, after "horse" insert "after the."
- " 290, " 2, for "out" read "and."
- " 348, head-note, line 24, for "is accepted" read "is not accepted."
- " 451, line 4, after "contrary" insert "that."
- " 451, lines 11 and 12, omit "could be received."



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DECISIONS  
OF THE  
SUPREME COURT OF NOVA SCOTIA,  
DECEMBER TERM, 1869-70.

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BELL v. CARRUTHERS.

**ACROSS of ejectment.** Defendant limited his defence to a portion only of the land sought to be recovered, and pleaded an equitable plea to the effect that he had obtained possession of the land in question in a verbal exchange between him and plaintiff's father in consideration of a certain other piece of land transferred by him to the father. Plaintiff replied that the exchange arose out of false and fraudulent misrepresentations of defendant and was afterwards repudiated and cancelled by his father.

It appearing from the evidence that after the exchange both parties immediately entered into possession of their respective lots, that defendant exercised dominion over the land in controversy for fifteen years up to the time of action brought, and including five years subsequent to the exchange during which the father lived, that the father died without ever having made any attempt to reclaim it, that the plaintiff was in possession of the land transferred to his father at the commencement of the action, and that the defendant had not, in fact, made any false or fraudulent misrepresentations as alleged.

**Held,** that his equitable plea was established, that he was entitled to retain all the land transferred to him by plaintiff's father, and consequently that there should be a general judgment in his favor.

The finding of fraud by the jury held unwarranted.

WILKINS, J., now, (December 7th, 1869,) delivered the judgment of the Court:—

The defendant, in this action of ejectment, limits his defence to a portion of the land claimed by the plaintiff, which is indicated in his plea, and he says, for a defence on equitable grounds, (the only plea necessary to be noticed,) substantially, that he obtained possession of the land in a verbal exchange between him and one *Robert Bell*, since deceased, the father of the plaintiff, in consideration of a certain other piece of land of which the defendant placed *Bell* in possession, and that the plaintiff, heir-at-law of the deceased, seeks to dispossess defendant unlawfully of the land in controversy. The plaintiff

replies to that equitable plea, among other replications to which we need not advert, that the agreement arose out of false and fraudulent misrepresentations of defendant, and was afterwards and before *the defendant's erection and improvements* stated in the plea, repudiated and cancelled by the said *Robert Bell*; that the agreement was procured by fraud and covin of the defendant, and by his misrepresentation of facts in relation to the line of the lands in question.

Among the undisputed facts in proof may be mentioned the following:—*Robert Bell*, before and at the time of the exchange, owned, (in common with others, but with exclusive possession in himself,) a portion of the north-western quarter of the *Murray* grant, of which the north-western boundary divided his land from that of the defendant, which lay in the *David Patterson* grant. *Bell's* land included a portion of the land sought to be recovered, viz., that which he transferred by the exchange. The defendant, at the same time, owned a part of what was called the *John Bell* land, lying to the eastward of the *Murray* grant. This included the land given by the defendant to *Bell* in the exchange, as set forth in the equitable plea. Shortly before the exchange the defendant had obtained a deed of one hundred acres, being one-half of the *David Patterson* grant. The division line of that grant, which subtended uncultivated land along the whole north-west side of the *Murray* grant, though up to the time of the survey of one *Miller*, hereafter noticed, it was ascertainable on the ground by reference to marks in different places, was not in that position which would conform to the *David Patterson* grant.

The defendant, five or six years before the exchange spoken of, had made another verbal exchange with *Robert Bell*, whereby he had transferred to him the possession of that same piece of land (originally part of the *John Bell* land) which *Bell* took under the second exchange, and retained up to the time of the trial; by which previous exchange the defendant had taken a small triangular piece of land situate, or then supposed to be situate, in the north-east corner of *Robert Bell's* quarter of the *Murray* grant. Both parties had gone into possession under that former exchange. A compromise line hereafter to

be noticed, if binding, and made between this defendant and *Robert Bell*, would establish, and if defendant's contention and assertion respecting it were believed, it did establish, that the triangular piece was included in the *David Patterson* grant, and was, consequently, defendant's own land at the time of the earlier exchange. *Robert Bell*, reminded of this, and appealed to by defendant, agreed to transfer to him the land which is the subject of the present action, he retaining the land by the *Baxter* road, which he had taken possession of under the former exchange. While *Robert Bell* retained possession of the land by the *Baxter* road, defendant entered on the possession of the land in controversy and exercised dominion over it for about fifteen years, to the time of this action brought, and including five years subsequent to the exchange, during which *Robert Bell* lived. He died without ever having made any attempt to reclaim it, and without having offered to restore to the defendant possession of the land by the *Baxter* road, of which, indeed, his son, the plaintiff, was in possession at the commencement of this action.

This cause was tried at *Truro*, in June term, 1867. Nine queries were submitted to the jury by the learned Judge, and were answered by the former, who found a verdict in these terms, viz : "For the plaintiff, or for the defendant, or both, for the whole, or for any portions of the premises in question, subject to the opinion of the whole Court at *Halifax*, on consideration of those, our findings, and the *whole evidence* with liberty, in considering the evidence *not covered by the issues*, to draw such inferences as a jury might draw, and that judgment may thereon be entered, according to the opinion of this Court."

The charge of the learned Judge is not reported, but the queries submitted, and the answers given, are in terms as follows :—

## QUESTIONS.

1. Was the bargain made which is alleged in the equitable plea, and did *Robert Bell* know of the erection of the mill and of the improvements?

## ANSWERS.

1. Yea.

2. Was such bargain made in consequence of the false and fraudulent misrepresentations of the defendant, and, if *yea*, in what did they consist?

3. Did *Robert Bell*, before the erection of the mill, and before the making of the improvements, repudiate and cancel the agreement, and give notice thereof to the defendant?

4. If not, did he repudiate and cancel the agreement at any later, and what time, and he do so on the ground of such alleged fraudulent misrepresentation?

5. Did *Robert Bell* and the defendant agree on the alleged compromise line, and did he ratify that line after the mill had been built?

6. Did *Robert Bell* agree to that line in consequence of any fraudulent misrepresentations on the part of the defendant, and, if *yea*, on what?

7. Did *Robert Bell* repudiate the said compromise line? When did he do so? And did he do so on the ground of such alleged fraud?

2. The suppressing facts that he only bought to the *Miller* survey, and by telling the *Bells* that he bought all the *Patterson* grant, and if such information had been given, they would never have consented to have changed the line and make the second exchange, according to his evidence.

3. *Nay*.

4. *Yea*. 2nd. *Shortly after the survey by Robert Bayers*. 3rd. We are of opinion that he did.

(NOTE.—*R. B.* died about 1857. *Robert Bayers* traced lines in 1852. Surveyed a subdivision in 1852. Surveyed for plaintiff in 1854, when *Robert Bell* was in his grave).

5. 1st and 2nd. *Yea*, and *Yea*.

6. *Yea*, on the defendant stating that the *Bayers* had consented to the compromise line, which they deny.

7. *Yea*. *After Bayers' survey*. We are of opinion that he did.

8. Has the defendant's land to the south of the *Baxter* road been retained in the use and possession of *Robert Bell* and his heirs, and has any offer been made to restore it to the defendant's possession?

8. 1st. Yea. 2nd. Nay.

9. Could *Robert Bell* have ascertained the real facts alleged to have been misrepresented, and how soon after the alleged misrepresentation might he have done so?

1st. Yea. 2nd. Almost at any time.

Looking to the evidence in connection with question 2nd and the reply given to it, we find defendant saying, "he, (*Bell*,) would not, I suppose, have exchanged, if I had told him I only owned to the old line;" and, further, "I did not tell him that I had bought to the old line." On these admissions alone, (and the evidence shews nothing else to support it,) the jury rest their expressed opinion that the bargain was made in consequence of fraudulent misrepresentations of the defendant. That inference is, whether viewed as a question of evidence or of law, totally unwarranted by the premises; and it must not be lost sight of that the Court is called on to decide whether, in Equity, the exchange is valid or invalid; as much so indeed as if, in view of those facts, it had been invoked by either of the parties to the exchange to decree mutual conveyances. That which was thus regarded by the jury as suppressed *was not an existing fact*, and that assertion, thus supposed by them to be untrue, *was not an untrue assertion!* The deed to the defendant, viewed in connection with *Dickson's* evidence, shews that defendant did not buy to the *Miller* survey *only*; and that he did buy all the *Patterson* grant—all of it, that is, in the only sense in which the phrase could possibly have been understood by *Bell*, or could affect his interests. *Dickson* ordered *Miller* to survey the land and subdivide it into two lots. *Miller* retraced lines that he found on the grounds—lines, the existence of which was notorious to the whole neighbourhood,—and made a plan subdividing into two equal

lots, which he handed to *Dickson*. *Dickson*, in the very terms of the actual description and boundaries (*relatively to half of the lot*) mentioned in the *David Patterson* grant, conveyed to the defendant. The deed gives defendant for a south-eastern boundary wherever a measurement of 20 chains on a course 45 degrees east from the southern side line of lands granted to *George Patterson* would place it. The words superadded to the description, viz., "*as re-surveyed and divided by Alexander Miller*," which words are perfectly satisfied by considering them to refer, as they do in fact refer, to a re-surveying of lines on the ground known alike to both these parties, in order to a subdivision of the whole two hundred acres into two lots, do not limit the previous descriptive language. To contend that they create an estoppel against the defendant from asserting whatever rights the deed gave him, independently of the words in question, is a proposition perfectly untenable. The deed, in terms, states the tract described to contain one hundred acres, more or less, *granted to David Patterson*. "It unquestionably, therefore, gave defendant all of the *Patterson* grant." The deed gives to defendant, in the very course and distance in controversy, a precise twenty chains on the northerly and southerly sides of the land conveyed; if, therefore, *Miller's* re-survey gave, as we know it gave, *per se*, a less distance than twenty chains on either side, and that re-survey—a thing extraneous to the written instrument and resting entirely in parol—were to limit the rights of this feeoffee a fundamental rule of construction of deeds would be violated. The statement made by the jury, that if such information had been given they would never have consented to have changed the line, and make the second exchange, is not only a gratuitous assumption, but it contravenes this evidence, given by one of plaintiff's own witnesses. *John J. Bayers* says, "I don't think the swap depended on the change of line." *Bell* says, "the reason for shifting the line was that defendant had not his complement, and the plan shewing that the line came to the middle of the *Bell* lot." Besides, as above intimated, the assumption is at variance with the terms of the actual contract.

But there could be no *fraudulent* suppression nor narration by the defendant that would invalidate or affect this



agreement in the respects under consideration, unless if either the agreement itself in its proved terms, or some rule of Equity, imposed an obligation on the defendant, in order to make the exchange binding, to tell *Robert Bell*, "that he only bought to the *Miller* survey," or not to assert "that he had bought all the *Patterson* grant." Now, uncontradicted testimony reported shews that no such obligation was a term or condition of the contract, and the law would imply no such obligation on the defendant in relation to it.

We must look at the agreement, too, in the light of the important consideration that *Miller's* survey or re-survey brought no new fact regarding the line in question to light; nothing that is not proved to have been known by *Robert Bell* at the time of the agreement. As regards the existence of any rule of Equity law which could affect the question, we shall have occasion to consider that presently.

Before considering the remaining question and answer, we must not fail to notice that the answer to the 3rd question involves the only issue raised by the pleadings (and to those, of course, we must be confined on the point of alleged cancelling and repudiation of the agreement by *Robert Bell*.) The only question raised by the 3rd replication is whether before defendant's erection and improvements the agreement was repudiated and cancelled by *Bell*. It is entire and alone so far as respects that point, and it is found for defendant. This alone would supercede the 4th question submitted and the answer to it. But the answer states that *Robert Bell*, after *Bayer's* survey, which was long after the erection, and on the ground of the alleged fraudulent misrepresentations supposed in the jury's answer to question 2, which we have already considered, did repudiate and cancel the agreement. Now the evidence not only does not support this but shews affirmatively his adoption and recognition of it for many years after it was made, and that he never did any act which would amount to repudiation during the five years that he lived subsequent to his making it. *Robert Bell* died about 1857. *Robert Bayers* traced the lines in 1852, surveyed for the sub-division in the same year, and surveyed for plaintiff in 1864, when *Robert Bell* was in his grave. Where is the evidence that *Robert Bell*,

after 1852, at any time *repudiated* and *cancelled* the agreement? There is none. After 1864 it was impossible.

The jury's answer to the 9th question gives pointed effect to *Robert Bell's* acquiescence and silence as well as to his acts of positive confirmation, which are in undisputed proof, by establishing that he might have ascertained the real facts, alleged to have been misrepresented, *almost at any time*, and therefore long before his death. By his death, too, after that long acquiescence and his many confirming acts, defendant is materially prejudiced in respect of the circumstance that he has lost the valuable equitable privilege of appealing to the conscience of the other party by the exchange which is now sought to be annulled, a privilege which he would have enjoyed if *Robert Bell* had instituted such a suit as that before us.

The 6th and 7th questions, with the answers to them, remain to be considered. As preliminary to inquiry into them we must remember that the jury have found as a fact that *Bell* and the defendant did agree on the alleged compromise line, and that *Bell* ratified it after defendant's mill had been built. If that agreement was in legal force at the time of the trial the defendant is, as a consequence, entitled to retain all of the land defended for, which extends from the north and west up to that line, and *that* whatever the result of the trial may be as regards the mill seat and the remaining portion of the land in question, which lies to the south and east of the compromise line. But was the agreement which fixed that compromise line avoided, or is it avoidable, in consequence of fraudulent misrepresentation on the part of the defendant respecting it? The jury says in answer to the 7th query submitted that after *Bayers's* survey *Robert Bell* repudiated the compromise line on the ground of fraudulent misrepresentation made by the defendant. No evidence exists to sustain this finding, and the very reverse of repudiation is the proved fact. But the jury's answer to question 6 shews that, in their opinion, *Bell* agreed to the compromise line on and in consequence of the defendant stating "that the *Bayers's* had consented to the compromise line," *which they deny*. That statement the jury have thus regarded as the fraudulent representation that influenced *Robert Bell* to consent to that line. Now, *first*, as the evidence shews that defendant asserted at the trial that

the *Bayers's* did consent, and that the *Bayers's* asserted that they *did not* consent to the compromise line, the jury should have found which of those conflicting assertions they believed. This they have not found, for such finding is not implied in the words "which they deny," especially not in the case of a special verdict, which the answer in question in effect is, under which nothing not distinctly stated can be inferred. But if the jury believed the *Bayers's* and discredited the opposing testimony in the case under review, it would by no means follow that such a statement made by the defendant to *Robert Bell*, unless it were expressly found by the jury that the statement was not only false in fact, but *not really believed to be true by the defendant when he made it*, would invalidate the agreement of compromise or deprive the defendant of any right which he had acquired under it. The case comes clearly within the principle of *Early v. Garrett*, 4 M. & R., 687, on which case *Sugden in Vendor and Purchaser*, 553, remarks thus: "The scienter in regard to fraud is the gist of the action where there there is no warranty." The case was thus: A purchaser bought and obtained a conveyance of an estate with all defects and faults of title, and the seller stated "that no rent whatever had been paid, which turned out to be false, and, the title being merely under a lease, the lessor recovered the estate; yet, as the jury found that the seller really believed no rent had been paid, the statement, though false in fact, *was held not to be fraudulent*, and the purchaser, although he lost the estate, was not allowed to recover back the purchase money." The fraud, if any, in that case, consisted of suppression by the defendants of the fact of payment of rent. The learned Judge who tried the cause put the question to the jury thus: "If the defendants knew at the time of executing the agreement (of sale) that rent had been paid to *Fox*, their suppression of that fact was fraudulent, and the plaintiff was entitled to recover back the purchase money; but if the defendants really believed that no rent had ever been paid to *Fox*, the suppression was not fraudulent, and they were not liable." And he directed them to find for the plaintiff, if they thought that the defendants knew that rent had been paid to *Fox*; if otherwise, for the defendants. *Nollett* argued that it was not necessary to constitute fraud in such a case, that a

direct falsehood should be uttered; the suppression of a fact within the knowledge of a party is sufficient," but, *per* BAYLEY, J., it was left to the jury as a question of fact whether the defendant really believed that no rent had ever been paid to *Fox*, and the jury found that the defendants did so believe. That being so, their statement that no rent had ever been paid, though false in fact, was not fraudulent." LITLEDALE and PARKE, J J., concurred.

The evidence shews that the defendant had very good reason to believe his statement in question to be true, from what is proved actually to have taken place between him and the *Buyers's*. The *true* line of the *David Patterson* grant was known and admitted by the *Buyers's* to be where the compromise put it. Defendant says, and it is admitted by the *Buyers's*: "I had a conversation with *John Bayers*, and it was stated by him that the line of the *David Patterson* lot struck the *John Bell* grant just at its centre." Immediately follows defendant's positive statement that *John Bayers*, on the ground, shewed where the line was; that he saw *Robert Bell* and the *Buyers's* and the defendant go down toward the place where the stones were placed; that the defendant said (note the *Buyers's* being present) the *Buyers's* had agreed to shift the line." Defendant says: "I might have told *Robert Bell* that the two *Buyers's* had agreed to that as the line, but it was in the presence of them all."

We are, of course, aware that the above is denied by the *Buyers's*, but even then the witness *John Bayers*, on examination, says: "I will not swear that defendant did or did not (that is at the very time and in the place where defendant had sworn the line was agreed to by the *Buyers's*) refer to the centre of the *Bell* lot as the line of the *Patterson* lot." *John Irvin Bell* says: "Defendant said that the *Buyers's* had said (*which was strictly true*) that the centre of the *Bell* lot was where the line should be;" adding, indeed, "I don't mind he said so." It is worthy of notice, too, how *John Bayers* confirms defendant's statement in relation to some leading features of defendant's narrative of what took place on the ground when he says: "*Defendant made the stone pile to shew where the lot went.*" That witness adds: "I don't remember defendant saying anything about the middle of the *Bell* lot. I won't say

he didn't. I can't say the tree was not there then. I saw a tree marked *J. B.* long before, when I came to the settlement. I think the defendant spoke of it." Note especially the testimony of the other *Bayers*, (*William*). Though he says he never agreed to the shifting of the old line, he carefully says in his examination: "I don't recollect ever having said that the line should be on the centre of the *Bell* lot,—*the fact was so, and I may have said so.*" Again: "*I might have stated I was willing to take the middle of the Bell lot as the line.*"

After this to speak of defendant's declaration 'that the *Bayers's* had consented to the line,' as a false and *fraudulent misrepresentation*—as a *false representation of what he did not believe to be true*—appears to us repugnant to reason. If defendant made no such false and fraudulent misrepresentation as the jury erroneously and unwarrantably supposed, then *Robert Bell's* assent to the compromise line, which is found as a fact, stands unrepudiated and unimpeached, and the effect it that defendant is entitled to retain his possession up to that line, and by consequence to a judgment *pro tanto*. From the views which we have expressed, if they be sound, it follows also that the defendant's equitable plea is established; that he is entitled to retain possession also of all the land of which possession was delivered to him by *Robert Bell* under the second exchange, and consequently, that there should be a general judgment for the defendant.

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### MCKENZIE v. McDONALD.

ACTION to recover the price of a certain building, and plea that the contract of sale was not in writing signed by the plaintiff.

The plaintiff gave in evidence that the building in question was erected on land to which neither of the parties claimed title, and that it rested on stone pillars which the plaintiff built.

*Held* insufficient to give the building the legal character of a chattel, and that therefore the contract was void under the third clause of the Statute of Frauds. Had the plaintiff shewn that the building rested on the pillars solely by its own weight, without being affixed to the pillars or connected with the soil, the case would still have been within the fourth section of the Statute.

WILKINS, J., now, (December 7th, 1869,) delivered the judgment of the Court:—

This action was brought to recover the price of a certain building, situate at Wine Harbor, sold by the plaintiff to the defendant. The first and second pleas denied the contract

as stated; the third plea alleged that the building was a tenement, and that it was not, nor was any interest therein sold by the plaintiff to the defendant by deed or note, in writing, signed by the plaintiff. The fourth plea was of a set-off. The jury found for the plaintiff under issues joined on the first, second and fourth pleas, and for the defendant on that which set up the Statute of Frauds. We think that, under the facts, viewed in the most favorable light that they will bear for the plaintiff, the finding under the third issue establishes in law a complete defence to the action.

The plaintiff contented himself with merely proving, in order to show that "the building" was, as he contended, "a chattel," that it was erected on land to which neither of the parties claimed title, and that it rested on stone pillars which the plaintiff built, and that the chimney was carried up from the second floor. Had he shown that the building rested on the pillars solely by its own weight, without its being fixed to or in, or connected with the soil or with the pillars by means of cement or other adhesive substance, or by any other means, it would have had the legal character of a chattel. *Rex v. Inhabitants of Otley*, 1 B. & Ad., 161; *Wansbrough v. Maton*, 4 Ad. & Ell., 884, and the cases therein referred to, are authorities to show that a building, *e. g.*, "a windmill" or "a barn" may be proved to be so placed in relation to the soil, or to a foundation incorporated with the soil, as to be a chattel, with all the legal incidents of such. See also *Browne on Frauds*, (2nd ed.,) sec. 234, n. 2.

But this building, in the light in which its character is presented to us, must be regarded as "land," and we must hold that the interest therein transferred by the plaintiff to the defendant, without note or memorandum in writing, which forms the subject of this action, was within the clause of the statute referred to in the plea. Had that interest not been within the third clause of our statute, *Rev. Stat.*, 3rd Series, chapter 118, it would have been, unless the verbal contract respecting it were followed by a change of possession such as, under authorities, would take it out of it, and there had been an equitable plea to that effect, clearly within the *fourth section* of the statute.



In view of those authorities, (see *Browne Stat. Frauds*, sections 476-477.) it could not be successfully contended that there was, in this case, such a clear possession taken by the defendant, in contra-distinction to that common possession which he and the plaintiff had at the time of the contract, as could be held to be a taking possession by the defendant, *in pursuance of the contract* of the building in question.

It is not necessary, however, that we should give any opinion as to the point last referred to. "It is perfectly settled by a long series of decisions, that a part execution of a verbal contract within the Statute of Frauds, has no effect at law to take the case out of its provisions." *Browne*, section 451, citing *O'Hertihy v. Hedges*, 1 Sch. & Lef., 123.

We think the rule *nisi* must be made absolute, so modified, as that the effect of it will be to entitle the defendant to enter up a general judgment on the issue joined on the third plea. So modified, it will, of course, be made absolute without costs.

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### COMEAU v. LEBLANC.

TRESPASS for removing a dwelling-house of plaintiff's which the defendant did in assertion of a right of way over the ground on which it had been erected. The evidence was conclusive as to the fact of a right of way having been enjoyed by the public over the land in question for a period of upwards of forty years.

*Held*, WILKINS, J., *dissentiente*, that it was thereby proved a public way common to all the King's subjects, and although defendant had relied upon plea of a private way instead of a public highway, still his defence was substantially good.

YOUNG, C. J., now, (December 7th, 1869,) delivered the judgment of the Court :—

This is an action for trespass for removing a small dwelling house of the plaintiff's, which the defendant did in the assertion of a right of way over the ground on which it had been erected. The plaintiff replaced the house immediately after and resisted a second removal by threats of violence, and having since retained the possession, he sought for damages in this suit, which, if recovered, must have been very small. The whole piece in dispute is of trifling value, the way being only a hundred paces in length, cutting off a quarter of an acre of wood land at the angle of two roads in

*Clara*. Settlers coming down the second division road, as it is called, found a steep hill and an unfinished bit before they reached the *Jonas Comeau* road leading to the shore, and had been in the habit for many years of cutting across this angle, and there was a large body of evidence showing the continued use of this cut. It was shown to have been travelled for all purposes and at all seasons of the year with carriages and sleds for a period, as some of the witnesses said, of upwards of forty, but, as all agreed, upwards of twenty years. The plaintiff himself acknowledged that he had gone by the path across the land and over the disputed road, as he thought, twenty years ago; and his first witness said he had travelled it for eighteen or nineteen and he would not say that it was not from twenty to thirty years. Defendant's witnesses testified that the road was marked and defined and that two teams could pass, in some places the ruts were eighteen inches deep. There was another road called the longer road across the lot to the north, which the plaintiff has also shut up, and which had been in use for a less period; but the body of the travel was on the shorter one. *Baptiste LeBlanc* said, "we have used the road in dispute about forty-two years, till the plaintiff shut it up. *Benjamin Belliveau*, the former proprietor, saw us use the road and hauled timber with us. Neither he nor any one else ever forbade me. There was a marked track. It was our ancestors who first opened that road. No public money was expended on it. But when the overseers had money to spend, they laid it out to clear away the rocks on the disputed road and to improve it and make it better for the people to come out." Another aged witness said that *Mr. Belliveau* told him to pick out the stones and make the road better, and that it was forty-eight years ago since it had been used. *Charles Doucet* had known the road in dispute for thirty-five years, and had travelled it with teams at all seasons, both going and coming, under the eye and with the sanction of the proprietor. The only answer to this mass of testimony was some alleged declarations of *Belliveau* that he did not want the road to be a public one, that he did not wish to lose the land or that the people should use the road without his permission. These declarations the Judge who tried the cause had difficulty in admitting as against the actual user,

but he left them all to the jury, who found a verdict for the defendant, which it would be quite impossible to disturb upon the merits.

The argument, therefore, turned mainly, if not altogether, upon the pleading, on which a very nice question was raised. This question does not appear by the Judge's minutes to have been raised at the trial, and it is obvious that if it had, the defendants could have at once cured the defect by an amendment. The ordinary plea of a public highway would have settled the case and left the plaintiff no pretence for argument. It is doubtful whether a party should be permitted to do this after verdict, and have a defence upon the merits destroyed, as is attempted here, by a subtlety in pleading. The defendant relied, somewhat incautiously, upon pleas of a private way, which must be proved, of course, as it is laid, and described it as running from the second division road, as the fact is, along and over the plaintiff's land to the *Jonas Comeau* road leading to the shore. Now it is said, that although this is the road that has been travelled and is claimed by the defendant in point of fact, it cannot be claimed as a private way for want of the proper termini connecting it with the defendant's land. It is contended that it cannot legally be described as passing from one highway to another unless it be itself a highway, and so pleaded. The forms in 3 *Chitty on Pleading*, 1121, 5th edition; in *Bullen & Leake's Precedents*, 3rd edition, 811, no doubt allege one of the termini as on the defendant's land, which, in the great majority of cases, must be the fact. But I see nothing in legal principle that prevents the creation of a private way, as it is alleged to have existed here. Suppose *Belliveau* had executed a deed to the defendants, or those under whom they occupy, granting them a right of way from the second division road across his land to the *Jonas Comeau* road. This would have been a private way restricted to the owners and occupiers of the defendant's two lots, and stretching from one public highway to another. But it will not be pretended that such a deed would not operate and pass the way, and if so, there is an end of the question, for, in *Wright v. Rattray*, 1 East., 381, Lord *Kenyon* confirms the rule, that any easement may be claimed by prescription in the same

manner as it might have been holden by grant. This road, under the evidence, is a public way, common to all the King's subjects, and would more properly have been pleaded as such, but I confess myself not at all sorry that one refinement can be met by another, which enables us to sustain the right. I may as well remark that the 5th section of the *English Prescription Act*, 2 & 3 Will. 4, chapter 71, permitting a general allegation of the enjoyment of a way and simplifying the form of pleading, has been omitted by some accident, for it could not have been intentionally done, in our Act of 1866, chapter 12, though both the preceding and following sections have been adopted in it, Practitioners must beware of this in framing their pleas, and follow the Common Law form. In the present case the pleader departed from the form without looking to the consequences, but we think his pleas substantially good, and therefore discharge the rule *nisi*, and give judgment for the defendants.

JOHNSTONE, E. J.—I concur in the judgment just delivered. If the way prescribed for is definitely set out it would have been carried by amendment as a matter of course had the objection been taken on the trial. To grant a new trial on this ground, would only be to allow the same question which was fully tried and decided for the defendant by overwhelming testimony to be gone over after amendment, and with the same result, for it would be impossible for rational and impartial men to come to any different conclusion. It would be superfluous to cite cases on this point, and I merely mention that of *Sampson v. Appleyard*, in 3 Wilson, 272, on account of the singular resemblance of its circumstances to the present, and because it is entitled to the more weight from being an old case, before the modern enlargement of the practice in favor of amendments.

I, however, do not think the way is definitely prescribed for in the pleas. I believe that a grant in fee actually made by the owner of the servient land for a valuable consideration to the owners of, and appurtenant to the dominant land in which the way was described in the very words of the plea, would have been a good grant. The subject was legal matter of contract, the grantee would by it give all he had power to

give, and the grantees receive all they required without interfering with the rights or needing the concurrence of any but the parties to the grant. To suppose such a grant involved, would be to give to technicality a greater triumph over reason than I am willing to believe the law in its utmost rigor ever permitted. The suggestion that the pleas did not directly connect the law with the dominant land overlooked, I think, the effect of both the termini being public highways, and the difference between such a case and one in which the *terminus a quo* was the land of a stranger. If such a grant would have been valid, a prescription in the same terms being founded on the prescription of a grant, cannot, I think, be invalid. I may remark that in the case in *Wilson*, the prescription was for a way leading from a certain common highway, and just as in the present case, no exception was taken. This would be a precedent for the pleas in this action, but the case is briefly reported, and it does not appear whether the way was appurtenant or in gross.

WILKINS, J., *dissentiente*.—I am of opinion that the plaintiff, having established the trespass complained of, and having been met by no evidence that supported every one of the pleas which professed to justify it, was entitled to a verdict on all the issues. By our law, and the established practice in accordance with it, a defendant seeking to justify an act which, unjustified, would be a trespass, must in his plea distinctly state all such matters of fact as are necessary to sustain his defence, while to the matters so stated he must confine himself at the trial. It is not competent for him to rely on any matters of fact before the jury which are not either so stated in his plea, as originally filed, or in those pleas as amended by permission of the presiding Judge. If the finding in this case, however, be sustained, the defendants will have relied successfully for their defence on matters not pleaded, and will obtain a judgment on the ground of a matter of justification which is not apparent on the record. Not only so, but that judgment will be founded on pleas neither of which has any support in the reported evidence. That evidence, if it goes the length of establishing a justification of the trespass at all, does so by showing that in the locality of the trespass there was, when it was committed,

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a public highway common to all the *Queen's* subjects. But the issue roll contains no such plea. Every one of the three pleas of justification relies on a way as a right in the defendants as the possessors of certain land, to which, in respect of an occupation of it, the right in question, exercised for twenty years, is alleged to be appurtenant. In every one of them it is set up as a way for the more convenient occupation of that particular land. In every plea the alleged trespass is expressly referred to as an act done by defendants (not in the exercise of a public right, but) to prevent an obstruction by plaintiff of defendants' then lawful use of an appurtenant way of private right.

This is substantially the alleged justification of the trespass which the pleadings disclose. There being no replication, the statute imposed on the defendants a necessity of proving every material allegation in the pleas. They were therefore bound, 1st. To prove themselves in possession at the time of the trespass of some particular land; 2nd. That the occupiers of it for a continuous period of twenty years, had in their own rights, in respect of that land, and for the more convenient occupation of it, the alleged right; 3rd. That they were obstructed by that which is the subject of the alleged trespass when they were engaged in the actual exercise of the right. Now there is absolutely no proof of the possession by the defendants at the time of the trespass of any particular land in which they were interested of right, that had any connexion with the way in question. There is no proof of any uses at all of the way in question in the exercise of the particular *private* right set up as distinguished from a common exercise by the inhabitants of the division of an asserted public right. Possession by the defendants, at the time of the trespass, of some particular land by virtue of which possession they had the alleged right of way—essential as it was to the support of the pleas—so far from being proved, is disproved by the testimony of each of the defendants. They proved that they occupied, respectively, the lands of their living parents, and not their own lands. They justify, each in his own right, and not by the command of another in whom the right was alleged to be. I have not felt it necessary to dwell on some obvious elementary principles of the doctrine of such an easement as that in question, *e. g.*, that if

the way set up be a private way, the termini must be stated. The *rationale* of this is that "termini" in legal intendment are not territorial points, but indications of the purposes of the way, in other words, of some interest in the use of it especially existing in him who asserts the right. In view of this it is obvious that there can be in law no private way which commences at a highway and ends in a highway. Such a statement which marks this case in one of its aspects is a solecism in pleading. Our late statute makes a right of private way depend on a continuous uninterrupted user as of right for a period of twenty years, but it leaves the rule of pleading, the character of the way, and the description of it just where it was before the statute.

It is suggested as a reason for upholding the verdict, that the learned Judge who tried the cause would, if he had been applied to, have allowed the addition of a plea of "highway." In regard to this, it would be sufficient to say, that no such application was made, and, that we, under the rule, are required to decide whether, under the pleas before us, the finding is in accordance with law and evidence. But while I am unwilling to carry the salutary law and practise of amendments, so far as practically to place professional empiricism and blundering experiments on a level with logic and science in pleading, I consider it at least questionable, if allowing at the trial of this cause the additional plea adverted to, would be such an amendment as was necessary for the purpose of determining in the existing suit the real question in controversy between the parties.

In conclusion, I must remark, that whether in any case the owner of land in the forest, being in its natural condition, unredeemed by cultivation, is to be held, without clear evidence of express dedication, by the mere fact of his having permitted settlers to use it for a time, to have conferred on the public an unreclaimed right to exercise a way over it, even after regular roads are subsequently laid out by authority, which may be used in substitution for the privilege so permitted, is a grave question, which at least demands it should not be forensically settled without a regular and formal issue, prepared solemnly to raise the question, I am of opinion that the rule should be made absolute.

DELISSOR v. THE PROVINCIAL INSURANCE  
COMPANY OF CANADA.

PLAINTIFF's vessel having run ashore, after ineffectual efforts to release her from the rocks where she lay, he gave notice of abandonment, which the underwriters refused to accept. They in the interest of all concerned very soon had her removed and repaired at a total cost of \$1300, and then tendered her to plaintiff who refused to take her, and brought suit for the full amount of the insurance. The defendants appealed from the verdict in his favor.

*Held*, that there should be a new trial in which the enquiry should be limited to whether the loss was *total or partial*; the question whether there was or was not any loss having been settled by the result of the first trial.

JOHNSTONE, E. J., now, (December 7th, 1869,) delivered the judgment of the Court:—

This is an action on a marine policy, in which the question raised at the trial was whether the loss of the vessel insured was partial or total, (constructively.) The plaintiff's case was, abandonment, after ineffectual efforts to release the vessel from the rocks between which she lay. The underwriters refused to accept the abandonment, and, in the interest of all concerned, very soon had her removed and placed in dock at an expense of \$400, and her repair completed at a cost of about \$900. Being repaired, the vessel was tendered to the plaintiff and refused.

There was great contradiction on all the points that arose; the difficulties of extricating the vessel, the extent of her damage, and the efficiency of the repairs put on by the defendants, were very diversly stated by the witnesses on either side, and the estimates of the value of the vessel before and after the disaster, as well as after the repairs, were extravagantly discrepant. The conduct of the underwriters, by their agent, *Mr. Whidden*, and his sub-agent, *Mr. Barss*, seems to have been in all respects proper. The persons selected by them for surveying and repairing were trustworthy and efficient; and, viewed in all its aspects, we have found it impossible not to feel that the case was one in which the defendants were justified in resisting the claim for a total loss, until it should be established on the fullest investigation.

Considering the great importance of marine insurance to the interests of commerce, and the propriety of affording to the rights, as well of the underwriters as the insured, all just protection, after maturely weighing the evidence and the finding of the jury, we have united in the opinion that it would



not be satisfactory to establish the plaintiff's claim to the whole sum insured, without a second enquiry on the only question which we think to be open to the defendant—that is whether the loss is to be considered *total* or *partial*. Whether there was or not *any* loss, we think it is too late to enquire, however peculiar may appear the circumstance of a vessel stranding in the *Liverpool* river, without, apparently, adequate cause from tempestuous weather. But the fairness of the loss seems to have been conceded,—the underwriters took possession and expended money in repairs,—the pleas do not directly indicate this defence, and, on the trial, the occasion of the stranding was not enquired into, or the fairness of the loss questioned by the defendant's counsel.

We, therefore, grant to the defendant a new trial, limited to the question of partial or constructive total loss, leaving to the parties all objections that were taken at the trial, or that can now be taken within this enquiry, on the condition of the defendant's first paying to the plaintiff the costs of the last trial, and that the costs of this argument on the rule *nisi* for a new trial abide the final result of the cause.

We have not felt at liberty to enquire into the nature of the sale of the vessel, which, it was intimated at the argument, had taken place since the trial, leaving it to the discretion of the respective parties to determine whether the present circumstances afford room for an amicable adjustment.

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### HARRIS, (ASSIGNEE OF TROOP,) v. MCCORMICK.

RULE *nisi* to set aside an award discharged with costs, there being no imputation on the good faith of the arbitrator, and his award appearing from the facts and pleadings to be just and reasonable.

The application to set aside an award must be made at the earliest opportunity after it has been given, and the rule *nisi* must be expressed as having been granted on reading the rule of reference, and the award, &c.

YOUNG, C. J., now, (December 7th, 1869,) delivered the judgment of the Court:—

The rule of reference in this case was made by consent 25th June, 1868, at *Annapolis*, whereby "all matters in dispute and difference in the said cause between the plaintiff, as assignee, or

the assignor and the defendant, were referred to the final award and determination of *A. W. Savary*, a master of this Court." *Mr. Savary*, as appears by the memorandum endorsed on the award, proceeded to the investigation alluded to by the counsel of both parties, on the 27th *June*, and, after several adjournments and a thorough inquiry into the whole matter, he pronounced an award in favor of the plaintiff, for which he has given his reasons at large, on the 26th *July*. There is no imputation on the good faith or conduct of the arbitrator, and with the voluminous pleadings and documents before us, and considering the care and thought that were bestowed on them, this is an award which ought not to be disturbed, unless some fatal objection to it can be made apparent. A rule *nisi* to set it aside on various grounds was obtained at *Kentville*, 21st *October*, 1868, to which two preliminary objections were raised. There having been an intermediate term at *Annapolis*, it was urged that the motion ought to have been made there, and though it is difficult to lay down any general rule, and the *English* practice hardly applies to our system, it is clear that such a motion ought to be made at the earliest opportunity, either at *Halifax* or in the county to which the cause belongs; and we refrain from giving effect to the objection now, because the application was made or about to be made at *Annapolis*, and the Judge was understood to have permitted it to be made in the then ensuing week at *Kentville*.

It was then urged as a defect, that the rule *nisi* was not expressed as having been granted, on reading the rule of reference and the award or copies of them,—and the cases in *Archbold*, 12th edition, 1886-9, 5 *Bing.*, 195; 3 *Dowl.*, 349, and our own decision in *Grant v. Hall*, 2 *Oldright*, 72, are to that effect; but as this rule was drawn "on reading the affidavit of *Otto S. Weeks* and the exhibits thereto annexed," which exhibits include the original rule of reference and the award, we think it sufficient.

The writ, in the first instance, contained a count on a promissory note of defendant's to *Troop* for £200, dated 26th *September*, 1861, at fourteen months, due therefor 14th *November*, 1862, to which were added the money counts. Then came two very long and special counts on an agreement made between *Troop* and the defendant, under seal, dated 22nd

*January*, 1862, and on an alleged agreement as to a claim paid for defendant by *Troop*, with other two counts, alleging a liability to the plaintiff as assignee. The defendant put in several pleas by way of denial, and a set-off for goods supplied and money paid to *Troop* between *October*, 1861, and *April*, 1862. This set-off amounted to upwards of £200, and neither the fairness of the charges therein nor the existence of the note were denied. The sole question before the arbitrator came ultimately to be the extent of the set-off to which the defendant was entitled as against the note.

Some of the objections urged under the rule *nisi* must be taken to have been waived. The assignment from *Troop* to the plaintiff was produced at the reference, though not at the argument, but the right of the assignee to sue can hardly be questioned after it was recognized in the rule of reference, and when it is stated in the award "that no question was raised as to the right of the assignee to sue at law in his own name."

On the 2nd *September*, 1865, four months before action brought, the plaintiff gave notice under the Act, *Rev. Stat.*, (3rd Series,) chapter 124, section 65, of his demand upon the note, and the arbitrator confined him to that demand, rejecting his claims under the special counts, on which the plaintiff, therefore, cannot have judgment.

The set-off, as has been stated, accrued between *October*, 1861 and *April*, 1862, and the transaction sufficiently shows how it accrued at this period. By the agreement of 22nd *January*, 1862, *Troop*, who had been preparing for it in the autumn, contracted to furnish all the planks, timber, &c., for a ship which the defendant was building, and the defendant agreed "to pay him the sum of 22s. 6d. per ton for each and every ton the said vessel may admeasure, carpenter's tonnage or measurement, so called." It does not say when the payment was to be made, and the exact amount could not be ascertained till the measurement was completed. The ship went on till *April*, 1862, when the defendant became embarrassed and could not proceed with it, and from his misfortune rather than his fault, the ship, as the award states, was never finished. But at the time of defendant's failure the award also finds, that the keel was laid, the stern frame and three

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other frames up, many other frames moulded, and half of the timber necessary to put the vessel completely in frame was dressed. The arbitrator concludes that the timber supplied by *Troop* to the sum of \$335.25, was in the ship, which *Troop* or his assignee would lose were it not allowed in this suit. That sum by no means makes him whole, because he lost a large part of the remaining timber and all the benefit of his contract. The fault found with the award is, that he was allowed anything. Now, who that understands the habits of the country can doubt that defendant's supplies to *Troop* were on account of this contract. There is nothing in the contract inconsistent with this view, and it would be a strange thing to attribute the supplies to the note which was not due till eight months after they had ceased. The rule as to appropriation of payments is stated in the award, as it is found in *Addison on Contracts*, 258-60, and more at large in *Broom's Legal Maxims*, 810 *et seq.*, and so far as it is applicable it is in favor of the plaintiff. But the best argument for the assignee and assignor, both of which are mentioned in the rule of reference, is the undeniable justice of the claim. Even if the arbitrator had been wrong in his law, as he is a barrister selected by the parties, and neither his capacity nor conduct impeached, we would have been slow to interfere. But as he has allowed, as against the note, all the defendant's set-off except the \$335.25 to which *Troop* was justly entitled, we think the award was right, and discharge the rule *nisi*, therefore, with costs.

## COX v. WITT.

PLAINTIFF being owner of a certain lot of marsh land allowed his son to cut and appropriate the grass growing thereon, which the son did for several years previous to action brought. Defendant owned an adjoining lot, and plaintiff brought trespass against him, alleging that in cutting his own grass defendant had mowed over the division line and into the plaintiff's lot. Two questions were raised by the issues; first, was plaintiff in actual possession of the lot and entitled to the grass; and second, was there any trespass at all committed? The jury found for plaintiff on both issues.

*Held*, that their verdict must be set aside, the evidence clearly showing that plaintiff, although the undisputed owner, had not such possession of the lot at the time of action brought as to entitle him to maintain trespass, and there being nothing to warrant their finding that there had been a trespass committed.

WILKINS, J., *dubitante*.

Wherever the jury decide against or without evidence, the Court will always exercise its right to control them, in order that justice may be done.

DESBARRES, J., now, (December 7th, 1869,) delivered the judgment of the Court:—

I do not think that the verdict in this case can be sustained. The action is brought to recover damages from the defendant for having entered the plaintiff's marsh at *Cornwallis*, and mowed and cut down his grass, and carried away and converted to his own use the hay made therefrom.

The first question that arises in this case is whether the plaintiff, assuming that he was the undisputed owner of the marsh land upon which the trespass is alleged to have been committed by the defendant, was at the time of such trespass in the actual possession of the land, or whether it was in possession of his son *Garland*, or any other person; and secondly, whether, if the plaintiff was in possession of the land, there is sufficient evidence of any act of trespass committed upon it by defendant to support the verdict. It appears from the report of the learned Judge by whom this cause was tried that the plaintiff, having married a daughter of *G. D. Pineo*, deceased, became entitled in right of his wife to a farm under *Cornwallis Mountain* and to a one-sixth part of a twelve-acre marsh at *Cornwallis*, of which his father-in-law died possessed. This farm, together with the strip or piece of marsh, the latter of which is the subject of the present action, were both set off to him in 1847, and both remained in his own occupation from that time until within two or three years previous to the trial in *October, 1868*, at *Kentville*, when he allowed his son to enter upon and occupy the farm, and to cut and appropriate to his

own use the grass which the marsh yielded, intending, perhaps, at some future time to convey to him the farm and the marsh. Of this, however, there is no proof, and we need not inquire whether the plaintiff had or had not any such intention, nor is it essential to our present inquiry to know whether the son was to pay rent to his father for the farm, or the right and privilege granted him of taking the grass from the marsh. The plaintiff, being the owner of both, had a right to charge rent for either, or to give both to the son free of rent if he thought fit; but it is very important to ascertain whether the plaintiff or his son was in the possession of the marsh when the trespass complained of was committed, and to know to whom the grass in the marsh belonged for the cutting and carrying away of which damages are sought to be recovered in this action. If the plaintiff was in possession and entitled to the grass, then the action was rightly brought, and the verdict, if any act of trespass was proved, ought to be sustained, but if the plaintiff's son was in possession, or was the party entitled to mow the grass for himself under the leave and license given to him by his father, then the son and not the father was the person by whom the present action ought to have been brought, for there is no evidence of any revocation of that license at any time previous to the grass being cut and carried away, and it may be questionable whether, (it being a license coupled with an interest, and the son having ditched and expended money on the marsh,) the plaintiff, if disposed, had a right to revoke it until his son had mowed and carried away the grass, but upon that point it is unnecessary to express any opinion; it is enough to say that there was no revocation of the license.

Referring to the question of possession, I think there is abundant evidence to shew that the plaintiff's son, or *Griffin* holding for him, was in the possession of the marsh and had a right to take the grass growing upon it and not the plaintiff. According to the evidence of the son, *Griffin* was in the occupation of the farm at the mountain under his authority, and was allowed by him to cut the grass on the marsh. At all events it appears that one or the other of the two was entitled to the grass for which the jury have given the plaintiff damages. On this point the evidence is, to my mind, too clear to be disputed. In the first place it may be remarked that the

plaintiff himself admits that his son occupied the back farm, and for some time cut this marsh on shares, and for the last two or three years had the grass for himself, but he says he never put him in possession. If he meant to make the impression that he did not give his son formal possession of the marsh on this ground, I can understand him, but if he meant that he allowed his son to cut the grass growing on the marsh, but did not allow him to occupy and protect the marsh itself while he did so then his evidence is to me incomprehensible and not entitled to much weight. The fact of the plaintiff's son being or not being in possession of the marsh and entitled to the grass does not depend on the evidence of the plaintiff alone; there is sufficient evidence besides to put that question beyond all doubt. First of all there is the evidence of *E. M. Cox*, one of plaintiff's own witnesses, who, speaking of the farm under the mountain, says: "The plaintiff's son lived there a year or two ago. The plaintiff told me two or three years ago that he let his son have the place under the mountain and the grass of this lot, (the marsh lot)." Then there is the evidence of the plaintiff's son, who says: "My father permits me to occupy the farm under the mountain on sufferance. I pay no rent. I never had the privilege of the grass until two years ago, when he told me to cut it, (the grass on the marsh). *I have no possession only to take the grass.*" And yet he makes statements in his cross-examination which negative his last assertion. He says: "I never mowed the grass for myself until a year before the trespass was committed. I dug a ditch between the lot and the post road. I paid the man who dug it, giving directions. I took the hay home and used it. *Mr. Griffin* occupies the place under the mountain, and cuts the grass on the marsh. *I allowed him to do so.* My father had given me the grass, and I allowed *Griffin* to mow it and use it on the farm." Again, there is the evidence of *Benjamin B. Woodworth*, another witness on the part of the plaintiff, who says: "I called this fall on the plaintiff to send help to work on the dyke. Plaintiff told me to call on his son, as he had the grass."

The evidence of the plaintiff's witnesses on this point is corroborated by that of the defendant on the defence. He says: "The plaintiff at different times told me, since the land

was dyked, that he had given that lot (the marsh) and the land on the mountain to his son, and it was hard he should have to pay some hundred pounds for him besides." *Melbourne Witt*, the son of defendant, says : " I have heard the plaintiff say at different times that he had given the benefit of the mountain farm to his son, and intended the marsh to go with it, as it belonged to it."

In the face of evidence coming out of the mouth of the plaintiff himself, and that of the other witnesses examined on his behalf, not taking into account the evidence of defendant and his son *Melbourne* on the same point, it is not easy to conceive on what ground it was that the jury could make up their minds to find a verdict for one dollar in favor of the plaintiff for the value of the hay mowed by defendant, even if it were cut to the west of the line by which and up to which both parties have held and mowed the grass on their respective lots for a number of years, ranging from year to year by the stakes and other visible marks on the ground to designate the division line. It is, in my opinion, a verdict wholly unsupported by evidence bearing on the question of possession. There is no evidence to warrant the jury in finding that the plaintiff was in the actual possession of the marsh, his own evidence and the evidence of his other witnesses whom I have named is entirely at variance with any such assumption. It is true he says he never put his son in possession, but he does not venture to say that his son was not in possession, nor does he venture to say that he did not acquiesce in his son's possession, for that would be inconsistent with his own evidence, and inconsistent, too, with all his repeated declarations that he had given the farm under the mountain to his son to occupy, and also allowed him to mow the grass on the marsh, which appears to have been an appendage of and appurtenant to the farm. What inference is to be drawn from *Woodworth's* statement, to which I have before referred, other than that the plaintiff considered his son to be in possession of and bound to protect the marsh. If he had not considered the possession to be in his son he would not have directed *Woodworth* to call upon him to perform the work to be done on the dyke. That part of the evidence of *Garland Cox, Jr.*, in which he says he had no possession of the marsh, and had only the



right to take the grass, is also inconsistent with the rest of his testimony, and at variance with all his acts. He admits that his father permitted him to occupy the mountain farm and to mow and take the grass from the marsh for his own use; that he dug a ditch between the marsh road and the post road, on the west side of the lot; that he allowed *Griffin* to enter upon and occupy the mountain farm, and to mow the grass on the marsh, to be used on the farm, and yet he ventures to assert that he had no possession of the marsh, and wishes it to be believed that he did not exercise any act of possession over the marsh. If all this be true the marsh is entirely unprotected, for when the plaintiff is asked to assist in dyking he refers to the son as the proper person to do the work, and when his son is asked if he is in possession of it, he answers that he is not, that he has only a right to mow and take the grass, a privilege not likely to be valuable for any length of time unless some person will soon have the courage to admit himself to be in possession. But assuming that the plaintiff's son had only the right to mow and take away the grass, can any other person than the son maintain an action for cutting and carrying it away? That principle is too clear to be disputed, and yet the plaintiff has brought this action for grass which he admits he had granted his son a right to mow and appropriate to his own use, and the jury have given him one dollar damages for it.

It may be said that the jury had a right to draw their own conclusions from the evidence in this case, and that the Court ought not to control them. Their right to draw their own conclusions from the evidence is at once conceded, *but wherever the jury decide, as I think they have decided in this case, against, or rather without, evidence, this Court will always exercise its right to control them, in order that justice may be done.* Entertaining the opinion I have expressed in reference to the first point arising in this case, that the plaintiff is not the person entitled to bring this action, if indeed there be any good ground of action against the defendant for the trespass complained of, it may not be necessary to touch or express any opinion on the second point, but I may say that having very carefully read and considered the evidence, I am of opinion that if this case rested alone on the second point or on the evidence produced in relation to the trespass complained of,

the verdict in this case ought not to be upheld. It is quite possible, from the nature of the line by which both parties have for years been content to hold and mow their respective strips of marsh, that without any intention of trespassing on each other, both may occasionally have mowed a few inches over the true line of division, and thus to this extent taken a little grass or hay from each other, but if such has been done I think the bringing of an action of trespass for such an act as that ought to be discouraged by this Court, the time of which is too valuable to be occupied with so trivial a ground of complaint. If it were an action brought to try a disputed boundary, though the actual damages sustained might be insignificant, it would be quite right to come here, but the line of division is not disputed in this case by either party, and the action is, in point of fact, brought merely to try the question whether the defendant, in varying from the two northern stakes to the south, has, as it would appear, unintentionally cut one or two hundred-weight of inferior grass over the line; a line too, which, though requested, the plaintiff is unwilling to have more accurately and particularly marked than it is.

The evidence on the part of the plaintiff is vague and uncertain, and in my view not at all sufficient to warrant the jury in finding that the grass was mowed on the west side of the division line. The plaintiff does not say that he was present when, or that he knew where, the alleged trespass was committed, yet he undertakes to say that the defendant wilfully trespassed on his lot. *E. M. Cox* only speaks of the line of division between the plaintiff's and defendant's marsh, and of his own occupation of the latter for seven or eight years before he sold it to the defendant, saying that there was a stake set near the river, and two or three more near the upland, by which, when mowing, he and the plaintiff always ranged to ascertain the line, and sometimes by the channel of the creek, admitted to be in the true line, but he does not say nor does he know when the trespass, if any, was committed. *Garland Cox, Jr.*, says that he never knew any other bounds than the two stakes, and that in mowing he used to go to the south and then range by them; that there was a creek on the line; that he never saw any other stakes until he went to mow in August, 1867, when he found defendant raking on his own

land, who told him that he had traced the line, and pointed out to him three stakes; that defendant raked up the grass cut over the line on his father's lot. He does not say that he ranged by those stakes to test the correctness of the line by which defendant had mowed, he merely says the defendant raked the grass cut over the line. *Benjamin B. Woodworth* also speaks of the division of the marsh into lots. He was not present at the division between the two *Cox's*, but knew the dividing line between them by the two stakes near the upland which were there then, and that there was a stone partly in the line. He says that *Garland Cox* shewed him where he said the trespass had been committed; that the plaintiff's son cut the grass on the lot the same year, but he did not say that he had any personal knowledge of any trespass. *Armstrong* says he was there in *October*, after all the grass had been mowed and removed, but that he could tell by the appearance on the ground where the line was by which the two lots had been mowed. *Bigelow* says that plaintiff's son shewed him where he said the trespass had been committed; that the hay was standing on the *Cox* lot, and the mowing on other lot *seemed to have crossed the line* from the two upper stakes, so that after all the only person who spoke from his own knowledge of the the cutting of the grass was *Garland Cox, Jr.*, the plaintiff's son. *Dickie* was merely called to appraise the damage as shewn on the ground. He says it was inferior dyke, and that *there might have been two or three hundred weight of hay cut*, value one dollar. He also says that there were three stakes at the north end of the marsh; that he ranged by the upper one and the lower stakes, which made two lines, and he adds what is very important in this case, that there was a stake apparently placed temporarily at the south which ranged with the two stakes standing most northerly, but he, too, knew nothing of the alleged trespass.

Now what is the evidence on the part of the defence. The defendant says that his son and *Tooker* mowed his lot in 1867, and that he went to the ground with them and desired *Tooker* to range the inshore stakes, and to tell him where to put a stake that he held in his hands; that he placed this stake half way down, according to *Tooker's* range; that he was in the habit of finding the line by setting up stakes temporarily

to range by the upper stakes when he mowed first; that the plaintiff's lot was sometimes mowed before he went there, and then he took what was left; and he positively swore that when he put down the stake for his son and *Tooker* to mow by he did not suppose that he was putting it more to the west than he was accustomed to mow by. *Melbourne Witt*, the defendant's son, says he went with *Tooker* on the ground, who shewed him the stakes he ranged by, and went with him all the way to the river, and shewed him where he mowed to; that *Tooker* pointed out a tree on the opposite side of the river which ranged with the stakes he shewed him, and that the line he shewed him as the line by which he mowed was further to the east at the creek than the line he (*Melbourne*) had been in the habit of mowing by, and that he knew this from the place the line struck the channel of the creek, and also from the range of the stakes. *Thomas Tooker*, the person who was employed by the defendant to mow his lot, and who certainly ought to know better than any other person what ground he actually did mow, says that the defendant shewed him where to mow by ranging the northermost stake with a broken stake about four or five yards from the first, that he did not then see the stone, but has since seen it, and knows that it lies about two rods from the first stake, and between these he and the defendant ranged; that he stood by the upland and defendant went further down with a stake; that defendant told him to range, and that he (defendant) put down the stake according to his range by the two upper stakes; that the stake was stuck down near a ditch or creek about half way down; that defendant put down the stake to his satisfaction *as near as his eye could range with the two upper stakes*; that he traced the line down to that stake and walked backward and forward three or four times till he got a line he could distinguish on the ground, and ranged this line by the stakes and mowed by it; that he noticed at the upland a tree *exactly in the line*, on the opposite side of the river, (and in the latter statement he is corroborated by *Armstrong*, the surveyor, who states the same fact); that he, (*Tooker*), pointed out the line to *Forster*, (surveyor,) and also shewed *Melbourne Witt* where he had mowed, adding that all that defendant said was that *he wanted the right line*. *Bernard Witt*, who was with

*Tooker* when he mowed the grass along the line, says that he mowed more to the east than *Tooker*; that he did not see the stone between the two stakes at the time, but saw it afterwards between the two stakes they marked by; that in 1866 *Garland Cox, Jr.*, told his father, in his presence, that he had mowed over the line, but that he would only rake up to the line.

This is an illustration of what I before remarked that from the nature of the line, which was at all times to be marked off for mowing by ranging from the stakes, it was quite possible both parties might occasionally mow over it, and if an action was to be brought by one against the other whenever this happened to be done, these little strips of marsh would indeed be fruitful sources of litigation that would make the ownership anything but profitable or desirable. *Edward Forster* only speaks of a measurement of the lots. He says *Woodworth* shewed him the two stakes near the north end of the marsh which he recognized as being in the line; that he measured at right angles from *Witt's* north-east corner across his lot which ran near by the upper stake, and found the whole width of the two lots nine rods fifteen links; that he then measured them separately and found *the north stake as near as possible in the centre*; that he then took the course of the two stakes pointed out by *Woodworth* and found the course varied seventy-two degrees westerly. That he then computed the quantity by that line and found *Witt* to have two hundred and eighty-three rods and *Cox* three hundred and two rods, inside and out of the dyke, a difference of eighteen rods, or nine rods more than half, and after performing other acts connected with his survey, he states that from the appearance on the ground he would say *the three stakes, including the stone, were set as one line originally*. But the question here is not where the true line ought to be by actual measurement; it is simply a question as to the position of a recognized line ranging from the two northern stakes near the upland in a direction south, and we have only to ascertain whether the defendant, when mowing his lot, mowed to the west of the line and thereby trespassed on plaintiff, (*Cox*.) or not. As to that, it appears to me that the evidence on the part of the defendant, particularly that of *Tooker*, shews most conclusively that the grass, for the cutting and carrying away of which

this action was brought, was mowed by defendant on his own lot, and not on the other lot of the plaintiff. I am therefore of opinion that the rule *nisi* for setting aside the verdict must be made absolute with costs.

WILKINS, J.—The learned Judge who tried this cause submitted to the jury two questions which were raised by the issues. The first respected the controverted fact of there having been, at the time of the alleged trespass, such a possession in the plaintiff as was required to maintain the action. The second was as to whether a trespass had been committed by the defendant. On both those points of enquiry the jury found for the plaintiff, and they assessed the damages resulting from the trespass at the sum of five shillings. The learned Judge, being applied to to certify, most properly refused to do so. As regards the second question, the evidence for the defendant, when weighed against that adduced for the plaintiff, so greatly preponderated, that if any real substantial advantage to the defendant could possibly result from our setting aside the verdict on that ground, I should be for making the rule absolute. To my mind, however, it is clear that no such benefit to him could result from such a decision. On the contrary, under the circumstances, we should, by setting aside the verdict, *be ourselves the promoters of useless protracted strife and litigation between those parties*. The costs already incurred by the defendant at the trial he must bear without recourse on the plaintiff in any future event. He has by the smallness of the damages, coupled with the Judge's withholding a certificate, a perfect immunity from liability for the plaintiff's costs. If the rule should be made absolute, and the defendant should succeed at a second trial, a spirit of retaliation and vindictiveness might be gratified by that result, which would subject the plaintiff to the costs of that successful contest, but no advantage from it would be experienced by anybody save the defendant's attorney, while the defendant's then position would be in no respect more favorable to him than his present one. The verdict establishes no right, and subjects the defendant to no costs in respect of which he can be indemnified in any future result.

As regards the first issue, that on the point of possession in the plaintiff, in regard to which the jury found expressly

"that the plaintiff was in possession of the land," I find in the plaintiff's evidence, which, of course, we must consider as that which they adopted, abundant support of the finding. The plaintiff and his son concur in stating that the plaintiff never put the son in the possession of the land, but merely conferred on him (without giving him any right to use the soil otherwise than in respect of the natural surface product of it) a gratuitous license to go on the land, at the hay-making season, and cut the grass, and appropriate it to his own use. The plaintiff's son says he never used the after-grass! *Edmund M. Cox*, the third witness for the plaintiff, after saying: "The plaintiff told me that he let his son have the place under the mountain," (a place which the son says he had on sufferance,) adds, (in perfect keeping with the evidence of the father and son on the point,) "and the grass on this lot." At the time of the real or alleged trespass committed, the son proves that he was preparing to cut, but had not cut any of the grass. The grass, therefore, cut by the defendant, if cut at all over the boundary, was unquestionably cut on land of which the soil and freehold were then owned by the plaintiff, and on land in respect of which, if plaintiff's witnesses were to be believed, the relation of landlord and tenant (even tenant at will) did not exist between the plaintiff and his son.

If on the point of possession the evidence for the defence contradicted the plaintiff's testimony, it could not be material, but there is in the former no testimony of an act done or a declaration made by plaintiff that is at variance with plaintiff's assertion that he merely gave his son leave to cut the grass. The son, if the arrangement between his father and him was intended to give him an interest in the soil, (which both he and the father deny) not being a tenant at will in respect of an entry originally made under contract for purchase or under analogous circumstances, nor a tenant at sufferance in respect of his holding wrongfully against his father after the termination of a possession by right, had no legal right whatever, the verbal arrangement for conferring the interest being absolutely void under the second section of our Statute of Frauds. He had no interest in the land,—he had a mere license revocable to cut the grass, and, as the evidence shews, the grass in question, for cutting which the

action was brought, to have been cut by this defendant—a mere stranger—the act of cutting on the plainest principles, necessarily operated as a revocation of the license, *inasmuch as that act made it impossible for the licensee to exercise the licence*. The injury, therefore,—the trespass—was done (not to the licensee, but) to the owner of the soil—to him who brought and could maintain the action. *Parker, C. J.*, in *Cook v. Stearns*, 11 Mass., 533, (see *Brown Stat. Frauds*, p. 29, § 26,) says in perfect illustration of this case as established by plaintiff and his son, whom the jury believed, “a license is technically an authority to do some act, on the land of another, without passing any estate in the land, *e. g.*, to cut down a certain number of trees.” *Browne* well says; “Such licenses are mere personal privileges, and so long as they remain unexecuted they are revocable by the grantor, and they are *ipso facto* revoked upon the conveyance of his estate, and expire with the performance, (and by a parity of reason on the state of impossibility of performing) the act or acts which they authorize to be done.” See also the leading cases of *Hewlins v. Shippam*, 5 B. & C., 221; *Wood v. Leadbitter*, 13 M. & W., 838.

It is surprising that the slightest importance should be attached to the ditch dug by the plaintiff's son. Nothing appears to show that the plaintiff knew anything of it, or that it was not, as regards him, a mere act of trespass committed by his son.

My opinion is that the ends of justice will be best satisfied in this case by discharging the rule without costs, the effect of which would be that the defendant, who had no useful purpose to subserve by bringing the case here, and who, therefore, ought to have acquiesced in the verdict, would be obliged to bear his own proportion of the costs of a useless argument which he has occasioned.



## IN RE EXTENSION OF LOCKMAN STREET.

AN application to order the immediate argument of a rule *nisi* for setting aside the proceedings herein on the ground of irregularity and illegality refused, there being only two days to the end of the Term and the other side not being prepared for argument and opposing the application.

SIR WILLIAM YOUNG, C. J., now. (December 30th, 1869.)  
delivered the judgment of the Court:—

We have considered the application made to us to order an immediate argument of the rule *nisi* obtained by *Bartholomew Walsh* for setting aside the proceedings in this case, on the grounds of irregularity and illegality. The records of the Court, and the motions made before us from time to time, shew that several other owners of property beside *Mr. Walsh* complain of these proceedings and are deeply dissatisfied with the damages that have been assigned them under the *City Act of 1864*, sections 260, 261. These sections are certainly of a most anomalous character. Three competent persons, not being interested in the road to be laid out or improved, are to be appointed by the City Council, who are to appraise the damages to be paid to those whose lands may be taken up, or whose buildings may be removed or destroyed in whole or in part for the improvement of any street, square, lane or public passage. By section 261, the appraisers (who are not even directed to be sworn) shall notify the parties interested, and hear them if required, and the appraisal being made by the three appraisers, or any two of them, notice shall be given to each person whose land is taken, or whose buildings are to be removed in whole or in part, or to his agent, ten days at least before the meeting of Council at which it is to be confirmed. The Council shall give any party objecting to the appraisal an opportunity of being heard and of proving his objections by testimony. If the expenses and damages appear to the Council excessive, when compared with the utility of the work, they may suspend or abandon the undertaking at any period, compensating for any damage actually done.

On the legal effect and operation of these clauses we abstain from offering any opinion. They have not been

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argued, and will probably come before us in various shapes. But as they comprehend all the legislation on the subject, except the 276th section, limiting actions against the city to six months, and, as further legislation may be deemed advisable in the approaching session, we think it right to observe, that no other instance is to be found in the legislation of this Province, where private property is taken without the consent of the owner for public uses, and the compensation absolutely fixed by appraisers, in whose selection the owner has no voice, and by the City Council, from whose decision there is no appeal. In most other cases, if not in all, the verdict of a jury or the discretion of a Court is invoked for the protection of the owner. The want of the usual guards and checks could not fail, in this case, to breed discontent, however ably or faithfully the appraisers and Council may have acted, as we cannot doubt they did. Of the particular facts in this case of *Mr. Walsh*, and of the delay in resorting to this Court and the causes of it, we need say nothing. There is, obviously, a common object in pressing for an argument and decision in the present term, and we should have held it of sufficient importance to justify a departure from the usual course, had time permitted. But, it is obvious, that with only two days remaining for arguments, and the Council of the City not fully prepared for, and opposing the discussion, justice could not be done to a subject of such momentous consequence and involving so many interests. We are reluctantly obliged, therefore, to refuse the application, and to leave the complainants to such remedies as the law, in its ordinary course, or the Legislature may supply.

HUMPHREY v. LONDON & LANCASHIRE  
INSURANCE COMPANY.

Is an action for the amount insured under a policy against fire the defendants pleaded over-valuation, want of insurable interest, misrepresentation of title, and false swearing in the preliminary proof. The Judge on the trial reserved the question as to the want of insurable interest, but submitted the other issues to the jury, who found them all in favor of plaintiff, and brought in a verdict for almost the full amount claimed. With regard to the interest of plaintiff, the facts were that he was at the time of the loss in possession of the premises under an agreement to pay for the same by instalments covering six years, he had paid a portion of the purchase money, and had improved the property by various outlays upon it, yet under the agreement he could not have demanded possession until a few days after the policy was signed.

*Held*, WILKINS, J., *dissentients*, that the plaintiff had an insurable interest, and that the verdict should be sustained.

SIR WILLIAM YOUNG, C. J., now, (January 6th, 1870.)  
delivered the judgment of the Court:—

This is a case of fire insurance, tried before me at *Halifax*, in which the plaintiff had a verdict, subject to certain questions arising or reserved at the trial. On the 19th *September*, 1867, the plaintiff obtained possession of the premises, including a frame building, which he intended to convert into a double dwelling house. On the 23rd he entered into an agreement with the owner, becoming the purchaser of the premises for £400, payable in six years from the 5th of November then next, to which period the parties who had given possession to the plaintiff had a right to retain it. The plaintiff then brought to the front and improved the building so as to increase its value to about £100, and applied to the agent of the defendants for insurance. The agent went up and saw it. The plaintiff, in his evidence, says, "he asked how much I wanted on it, and made a memorandum on an envelope he held in his hand. I told him I meant to convert it into a dwelling house. I suggested \$800, as I was going to improve it, which was beyond its then value." In his cross-examination he said, "*Mr. Scott* saw the building from the opposite side of the street, but did not examine it. It was before the 30th *October*, the date of the policy. I told him I was about to make a double dwelling house of the building, but did not make it out (on account of the fire.) *Mr. Scott* insured it on that representation." The policy was for \$800 on the building, which is described as a building owned and

occupied by the insured, and \$400 on the stock of lumber contained therein. At the time of the fire the plaintiff testified that the value of the building had risen to \$600, and he claimed \$450 for the lumber therein, including under that name doors, sashes, benches and other articles not properly belonging to it. In his preliminary proof he reiterated the words of the policy, describing the house as owned and occupied by him, and claimed for a loss of \$600 in respect thereof and \$450 for the lumber; making \$1050 in all. The agent was not called at the trial to contradict him as to the circumstances under which the insurance was made, and the fairness of the loss was not impeached either in the pleadings or evidence. The defendants paid into Court \$230 in respect of the lumber, and the jury found a verdict for the plaintiff in \$600 for the house and \$350 for the lumber, less the \$230 paid in.

There are no less than fourteen pleas upon the record, which are mostly repetitions of each other, according to the fashion which is again coming into vogue, but which this Court does not favor. These pleas resolve themselves, as regards the building, into charges of over-valuation, want of insurable interest, and misrepresentation of title, contrary to the fourth condition of the policy, and of false swearing in the preliminary proof, contrary to the twelfth condition.

With the exception of the want of insurable interest, which I reserved as worthy of further inquiry, my own impression on the evidence was against these charges, which I left, however, to the jury, who found them, as I think properly for the plaintiff. The policy was insisted on at the argument, to bring it within the fourth condition, as a valued policy, but it is not so. The definition of a valued policy is given in 2 *Phillips on Insurance*, (3rd edition,) sections 1178, 1203, and there is an example of one in *Kane's case*, 8 Johnston, 229, where the goat skins insured were "valued at 50 cents each." This is a totally different thing from the present policy, which is an open one, and the value to be proved. Now the defence of over-valuation applies only to a valued policy, and this defence is disposed of by the very terms of the condition. I think, also, it would be a very hard thing to defeat the plaintiff's claim on the ground of false swearing. The jury have confirmed his valuation of the

building at \$600 when the fire occurred, and the difference between the \$350 they have found, and the \$450 the plaintiff claimed for the stock on hand turns upon the true meaning of the word lumber, which the plaintiff may have taken, and probably did take in the larger sense, as covering all his wood stock. What jury would have been justified, under these circumstances, in convicting the plaintiff of having sworn falsely?

This seems to me a totally different case from that of *Levy v. Baillie*, which was cited at the argument from 7 Bing., 329, and has made a deeper impression on one of my learned brethren than it has made upon my mind. There were the *indicia* of fraud. The plaintiff swore to a loss of £1085, viz., £85 for goods injured in the process of removal, and £1000 for goods abstracted by the crowd assembled at the fire, consisting of building articles, which, as it was proved at the trial, could not have been carried away without being seen.

The jury, on the question of fraud left to them, found for the plaintiff, with £500 damages—less than half his demand, and the Court made the rule absolute for a new trial, on payment of costs. On this case, *Angell*, in his treatise on *Fire Insurance*, sections 260-375, remarks that the finding of the jury was not necessarily a proof that there had been fraud in the plaintiff's claim, as he might, by mistake, have estimated the goods lost at more than their value. The assured, he says, may err in opinion, (just as the plaintiff erred here,) without being guilty of anything like fraud, and he cites a case from 16 *Shepherd*, (Me.) Rep., 97, where it was held that the fact of the assured having in his affidavit estimated the value of the goods consumed at \$2800, and the jury having returned a verdict for \$1853 only, is not such evidence of fraud and false swearing as would justify the Court in granting a new trial. This latter case, so far as it guides us by way of analogy, is in point. We must not forget that we are dealing with a fair loss. It is probable, indeed hints were thrown out, that the defendants suspect fraud, and justify themselves on that account in setting up these strict defences; but it is impossible for us to be swayed by suspicions without proof. Such defences, therefore, are not to be favored, and should

prevail only where the law and the evidence are clear. In justice to insurance offices, it must be conceded that they are rarely put forward where the claim, as *Mr. Ellis* expresses it, is tolerably fair and honest; and where it is not, an insurer has a right to avail himself of every objection, however technical or astute.

The real question here turns on the interest of the plaintiff at the date of the policy being insurable or not, and it is a question of some moment, as I have reason to believe that insurances of the same kind, where the assured enters under contract and without title, are constantly effected. On the 30th *October*, the plaintiff had been in possession of the premises and had been improving them by various outlays since the 19th *September*. He had signed the agreement of the 23rd, and paid a small amount towards the purchase money. On the 5th *November* he was to come under interest on the balance, payable every six months, and he bound himself to pay the principal in six years. He agreed also to put up a good and substantial building on the premises, worth an annual rental of not less than £25 a year, which he has since done. It cannot be denied, under these circumstances, that the plaintiff had an interest in the land—a *bona fide* and actual interest, fortified both by possession and outlay,—he had an interest which a Court of Equity would have enforced independently of possession, and it makes no difference, therefore, that under the contract he could not have demanded the possession till a few days after the policy was signed. The two leading cases on this subject in *England* and the *United States* are those of *Lucena v. Crauford*, 2 Bos. & Pul. New Reports, 302, and *Columbian Insurance Co. v. Lawrence*, 2 Peters Reports, 25. In the former, which was a case of marine insurance, (the principle being the same as in the case of fire insurance,) Lord *Eldon* said, "that since the Statute of 19 George 2, it was clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavored," he adds, "to find a fit definition of

that which is between a certainty and an expectation, nor am I able to point out what is an interest, unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the property." The property here spoken of is personal property, the subject of marine insurance, and the recent case of *Wilson v. Jones*, 15 *Law Times Reports*, 669, has recognized as an insurable interest that of the plaintiff as a shareholder in the Atlantic cable—his interest, in fact, in the adventure—thereby protecting him from all the contingencies and perils to which it was exposed.

No *English* cases were cited at the argument, and I have found none on the interest of an insurer against fire. The rule is laid down by *Marshall*, 2789, and *Ellis*, 22, that a trustee, or mortgagee, or reversioner, a factor or agent with the custody of goods to be sold upon commission, and, probably, says *Ellis*, a pawnee, depository, or common carrier, may insure their respective interests, subject to the rules of the different offices. Nothing, however, is said of the interest of a purchaser under contract, and for this we must resort to the *American* cases. They are summed up in *Angell's Treatise*, section 66, the chief of them, as I have already stated, being the decision in 2 *Peters*, pronounced by Chief Justice *Marshall*. "That an equitable interest, says he, may be insured, is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract exists; the party claiming under it has, undoubtedly, a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The cases prove, we think, that any actual interest, legal or equitable, is insurable." The other cases cited by *Angell*, and affirming this doctrine, I abstain from noticing in detail, as the *Reports* are not here. They were mostly decided in *New York*, and an observation of Chancellor *Walworth*, in a case, where, as in this, the assured not having the legal title, described himself as the owner, has peculiar significance. "It is a fact," said he, "of public notoriety, that in

common parlance, the party who is in possession of real property, as owner, under a valid and subsisting contract for the purchase thereof, whether he has paid the whole purchase money and obtained the legal title or not, is called the owner thereof, and the property is usually called *his* by others. In equity, it is in fact his; and the vendor has only a lien thereon for the security of his unpaid purchase money; and it would be singular, if the person who is in the actual possession of property as the real owner thereof in equity, and who must sustain the whole loss thereof, primarily, in case of its destruction by the perils insured against, cannot insure it as owner." *Marshall* adds, by way of caution, that the nature of the property should be distinctly specified, and that all the insurances upon the same property, taken together, shall not exceed the full value thereof, which the insurances in some of the *New York* cases certainly did. Chief Justice *Marshall* also remarks, that while it is unnecessary for the insurer to state every incumbrance on his property, fair dealing requires that he should state everything that might influence the underwriter in forming or declining the contract. A building held under a lease for years about to expire, might be generally spoken of as the building of the tenant; but no underwriter would be willing to insure it as if it was his, and an offer for insurance, stating it to belong to him, would be a gross imposition."

Was any imposition, then, misrepresentation for a fraudulent purpose, or concealment practised by the plaintiff in this case? It would have been more prudent for him, as it would be for others in the like circumstances, to have had the nature of his interest stated in his policy, but there is not the slightest ground for believing that the information was deliberately or wrongfully withheld, while the case of *Fletcher v. Commonwealth Insurance Company*, 18 Pick., 419, shews that some obligation lies also on the underwriter to make inquiry, and that a verdict, as in this case, acquitting the plaintiff of fraud, ought not lightly to be disturbed. For these reasons, I am of opinion, as the jury confined their verdict to the actual value of the building when it was destroyed, and deducted \$100 from the plaintiff's estimate of his stock, that he is entitled to judgment for the sums they have awarded.



WILKINS, J.—In the view we take of this case, it is unnecessary to consider several points which were taken at the argument, although neither of them seems to present any difficulty, when examined in the light of authorities, *English and American*, and the principles deducible from them. The defendant's counsel insisted that in this case there had been a fraudulent over-valuation and false swearing in support of the plaintiff's claim, and he contended also, that under the fourth condition of the policy, being a valid one, there was an admitted over-valuation by the insured, which, *per se*, rendered the policy void. Now, we do not feel ourselves called on to decide whether, in considering the meaning and effect of that condition, we should or should not be obliged to hold that it induced a different rule of construction on the point of alleged over-valuation, from the well-known one which exists independently of such an expressed condition. It is sufficient for us to say that, contrasting the plaintiff's positive assertion of the value of his property insured, in relation to which he claimed as for a total loss,—an assertion attested to by him in his statement before the Notary Public with his own admissions at the trial, of the value of that property at the time of the policy executed, and at the time of the loss, and, considering this in connexion with the verdict given him less than his claim, we are of opinion, that the question before us under the rule is governed, in the respect last adverted to, by the principle of *Levy v. Baillie et al.*, 7 Bing., 349, which is rather more fully reported in 5 *Moore & Payne*, 208. In that case the plaintiff effected a policy of insurance against fire, which contained a condition "that if fraud should appear in the claim made, or false swearing in support thereof, the claimant should forfeit all benefit under such policy." The plaintiff's property was insured in £1000, and in his affidavit he stated that in consequence of the fire, he had sustained damage to the extent of £1085. The jury, after Chief Justice *Tindall* had left it to them to say whether the plaintiff had made a fraudulent demand, found a verdict for the plaintiff, with damages, £500. Sergeant *Taddy* obtained a rule *nisi* to set aside the verdict, on the ground, that, as by the fifteenth clause of the policy, a party insuring who made a fraudulent claim was to forfeit all benefit under the policy,

and the plaintiff did claim £1085, and the jury had found that he was entitled to £500 only. Such claim was evidently fraudulent, and, therefore, the finding of the jury amounted in effect to a verdict for the defendants, and the jury could not have decided on the question, which was properly left to them, and was the only point for their consideration. Mr. Sergeant *Wilde* and Mr. Sergeant *Andrews* contended on the other hand, that the finding of the jury did not necessarily imply that there was any fraud in the plaintiff's claim, or false swearing in support of it, so as to bring it within the fifteenth clause of the policy. "He might," they said, "have estimated the goods at more than their real value." Lord Chief Justice *Tindall*, however, said, that the Court had considered all the circumstances of the case with great care and anxiety, and they were unanimously of opinion that the defendants were entitled to have the question further investigated by another jury; and, therefore, that the rule for a new trial should be made absolute, on payment of costs. We are of the same opinion in relation to the case before us, and consider that the rule should be made absolute in it subject to the same condition.

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## NEAL ET AL. v. HENRY.

PLAINTIFFS' declaration contained a count upon a guarantee to a firm given by defendant, and on the faith of which goods were alleged to have been supplied to the person therein named. Defendant demurred to the count, and it was adjudged bad because it did not thereby appear that the plaintiffs were the persons who composed the firm when the goods were supplied under the guarantee.

WILKINS, J., now, (January 6th, 1870,) delivered the judgment of the Court:—

The count demurred to is in these words: "Also for that the defendant on the 8th day of *July*, 1867, prepared and subscribed his name to a written guarantee in the words following:

"To MESSRS. NEAL, WHITE & Co.

"*Dear Sirs*,—I hereby guarantee the payment to you of such goods as you may supply to *Mr. Andrew McFarlane*, to the extent of \$600."

that plaintiff thereupon supplied to said *Andrew McFarlane* goods to the extent of \$600, on the faith of such guarantee; but neither the said *Andrew McFarlane* nor the defendant has paid for the goods, and the said \$600 is now over-due and unpaid." The demurrer thereto is as follows: "And as to the third count of the plaintiffs' writ, the defendant says that the same is bad in substance, for the following reasons, that is to say, first, that the said count does not shew that the said guarantee therein mentioned was delivered to or directed to be made to plaintiffs, or that the said plaintiffs had any authority from the defendant thereby to supply to the said *Andrew McFarlane* the said goods under the said guarantee; second, that the said third count does not shew that the credit for the payment of the said goods had expired before commencement of the suit; third, that the said count does not contain or assign any sufficient breach for the non-payment of the price or value of goods supplied under the guarantee, as alleged; fourth, that the said count does not show any sufficient cause of action against the defendant.

The defendant is summoned by the writ to appear at the suit of *William H. Neal, James White, and John K. Creed*, of the city of *Halifax*, merchants, doing business under the name and style of *Neal, White & Co.*, who say the defendant is indebted to them, as in the count in question set forth. Our statutable rule of pleading (sec. 54 of c. 134, *Rev. Stat.* (3rd Ser.)) declares "the sufficiency of clearly and distinctly stating all such matters of fact as are necessary to sustain the action, defence or reply, as the case may be." Let us try the sufficiency of the count thus demurred to by this test. It must, of course, be received as if it were the only count in the writ.

The following facts were necessary to sustain the action, viz: that on the faith of a guarantee of defendant, communicated to those persons who then composed the firm, to which, as such the guarantee is addressed, these plaintiffs as such firm, supplied to *McFarlane*, the person named in the guarantee, the goods to which it refers, and that these plaintiffs were, at the time this action was commenced, the same persons who composed the firm when the goods were supplied under the guarantee. The law is clear that the defendant's liability

under the guarantee was a liability to those and those only who, when he gave it, composed the firm. If subsequent changes in the firm have occurred from any causes but death or bankruptcy, those and those only who were the original members of the firm can sue. See *Lindley on Partnership*, 347 and following pages. For the purpose of an inquiry, we are bound to consider that in the interval between the 8th of July, 1867 and the 15th of September, 1869, changes in the firm may have taken place. Now, this writ imports that on the last mentioned day, being that when the writ issued, these plaintiffs were doing business under the name and style of "*Neal, White & Co.*," but it does not import that these plaintiffs were so doing business on the 8th of July, 1867. The count does not, therefore, state a matter of fact necessary to sustain the action. *Stephen* states it to be a canon of pleading, "that it must not be argumentative," and he explains that to mean, that all facts necessary to the sufficiency of the pleading must be positively alleged, and not left to be gathered by inference. This rule applies to the case before us, because that those plaintiffs composed the firm when the guarantee was given is mere matter of inference, if such could be made from the alleged fact that they were the firm when the suit was commenced.

The other objection taken to the count, viz.: that it merely alleged that defendant prepared and subscribed his name to a written guarantee without stating that he delivered it to the firm, does not strike me with much force, for this reason, viz.: that the count shews, necessarily, that it was delivered, because there follows an allegation which implies it, that is to say, "that plaintiffs thereupon supplied to *McFarlane* goods, &c, on the faith of such guarantee." It follows, from what has been stated, that we adjudge the count bad.

## WHEELLOCK v. CHESLEY.

ACTION by indorsee against maker on a promissory note expressed to be for the amount of £40 10s. 3d. Defence—usury. The note had been transferred from the payees to the plaintiff for the sum of £37, it being then overdue and defendant's liability upon it amounting with interest accrued to £42 13s. 3d. There being nothing to shew that the transaction partook in any degree of the nature of a loan, and the jury having found that it was in fact a *bona fide* sale of the note for what the parties considered its marketable value,

*Held*, WILKINS, J., *dissentiente*, that the *Usury Act* had no application, and that plaintiff should recover the full amount.

DESBARRES, J., now, (January 6th, 1870,) delivered the judgment of the Court:—

This was an action on a promissory note dated 5th April, 1867, drawn by the defendant, payable to *Elizabeth Bent* or order for £40 10s. 3d., six months from the date, with interest. It was indorsed by the payee, together with *Edmund Bent*, her husband, in May, 1868, to the plaintiff, who now seeks to recover the amount of it as such indorser from the defendant. At the trial before His Lordship the Chief Justice, the defendant, abandoning the first and second, relied on the following pleas:—3rd. That the plaintiff obtained the indorsement of the note from the payees for a usurious consideration. 4th. That the contract and agreement by which the plaintiff obtained the indorsement of the note from the previous holders or payees was a usurious contract. 5th. That plaintiff obtained the note from the previous holders and payees for a usurious consideration. 6th. That the plaintiff received the note from the original holders and payees without value. 7th. That the note, being long overdue, was discounted with the previous holders and payees by the plaintiff for a sum of money very much less in amount than the principal money or consideration of the same. 8th. That the plaintiff purchased the note as indorsee from the original holders and indorsers for a consideration which was usurious.

It was proved by *Edmund Bent*, one of the indorsers, who was called as a witness on the part of the defendant, that he had sold the note to the plaintiff, who had paid him £37 for it, and the learned Chief Justice instructed the jury to consider whether the sale of the note was a pretext or cover for usury, or a *bona fide* and real sale, without intention to have recourse on the payees, and to find their

verdict, either for plaintiff or defendant, according to the conclusion at which they arrived. There was a verdict for the plaintiff, and it was contended on the part of the defendant at the argument of the rule for a new trial that there was a misdirection inasmuch as the indorsement, not having been expressly stipulated to be without recourse, could not be regarded as made as a sale, but only as a loan for the money paid, which, being tainted with usury, prevented the plaintiff as indorser from recovering against the defendant as the maker of the note.

It is not necessary to review all the cases cited by defendant's counsel. It is enough to refer to two or three of them, which, I may remark, like the rest, do not in my view support the position thus taken, but the reverse. First is the case of *Daniel v. Cartony*, 1 Esp., 274. That was an action on a bill of exchange drawn by one *Scott* in his own favor and accepted by defendant. The defence set up by defendant was that *Scott* discounted it with a person who took it for 18 per cent., but he did not impeach the transaction by which the plaintiff had become possessed of it. Lord *Kenyon* held that it was no defence, saying: "If the note had been originally given as an usurious consideration it would have been void in the hands of a *bona fide* holder, but usury in any intermediate transaction respecting it could never make it void in the hands of a *bona fide* indorsee, where there was no usury in the original transaction." In *Parr v. Eliason*, 1 East., 94, the same learned Judge held that where the bill in its original formation was given for an usurious consideration, the words of the *Statute of Anne* were peremptory that the assurance shall be void, and he remarked that the construction which had been put on the statute had gone far enough in saying that it shall be avoided even in the hands of an innocent indorser without notice. In that case the bill was fair and legal in its concoction, and therefore no advantage could be taken of what happened afterwards against *bona fide* holders, thus maintaining the same principle previously laid down by him in *Daniel v. Cartony*. *Lowes v. Mazzarido*, 1 Starkie, 385, was an action by the plaintiff as indorser against the defendants as acceptors of a bill of exchange drawn by one *Lowes* on the defendants, payable to his own order. It was indorsed by *Lowes* to *Sir*

*M. Bloxham*, by the latter to *Ambrose*, and by *Ambrose* to the plaintiff. It appeared that *Loves* took the bill to *Sir M. Bloxham* to get it discounted, and that the latter agreed to do it on receiving one-half per cent. commission and five per cent. as loss incurred in selling out stock. *Loves*, the drawer, acceded to these terms, and the bill was indorsed at the time of the transaction. It also appeared that the plaintiffs, upon the indorsement to them, had received one-fourth per cent. besides commissions as brokers. The defence was usury committed upon the indorsement of the bill by *Loves* to *Sir M. Bloxham*, and by the plaintiff in taking the bill by indorsement upon *Ambrose*. Lord *Ellenborough*, before whom the cause was tried, was of opinion that the plaintiffs were not entitled to recover on the bill, since they were obliged to claim through an endorsement which had been vitiated by usury, but he permitted the plaintiffs to take a verdict subject to a motion to enter a nonsuit, and the Court, after argument on a rule obtained to that effect, held that the first indorsement was entirely avoided by the *Statute of Usury*, and that the indorsement to the plaintiffs was also infected with usury, and the rule for entering a nonsuit was made absolute. That case is distinguishable from this. There *Sir M. Bloxham* could not have maintained an action against the maker, because as between him and the maker the transaction was usurious. Here as between the maker and *Bent*, the payee, the note was unimpeachable, and *Bent* could have enforced payment from the defendant maker the moment the note became due.

It is not pretended in the present case that as between the drawer and the payee of the note in question the consideration was usurious, but it is contended that as the sum paid by the plaintiff to the payee on the indorsement of the note was much less than the amount due upon it at the time of the indorsement, the transaction was for that reason usurious, and the plaintiff therefore precluded from recovering as the indorser of the note. To constitute usury there must be a loan in contemplation between the parties. Here the jury, by their verdict, have found that there was no loan, but that there was a *bona fide* sale of the note by *Bent*, the payee, to the plaintiff, and the question submitted to us is whether such a sale comes within the operation of and can be affected by chapter 82,

section 1, *Revised Statutes*, (2nd Series,) which declares, "that no person upon any contract shall take, directly or indirectly, for the loan of monies or goods above the rate of six per cent. per annum, and that all contracts whereby a greater rate of interest is reserved shall be void." No case has been produced to shew that the holder of a note may not in good faith sell it to another at its marketable value, and I would be much astonished to find any case holding such a sale to be affected by the *Statute of Usury*. I have not found any *English* case in relation to the sale of notes and other securities, the case of the *King v. Ridgely*, 4 Price, .50, being clearly a case of loan; but the *American* cases shew very clearly that such sales made in good faith are legal and not usurious there. In 3 *Parsons on Contracts*, 143, (5th Edition,) he says: "It is quite settled that negotiable paper may be sold for less than its face, and the purchaser can recover its whole amount from the maker when it falls due, although he thereby gets much more than legal interest for the use of his money; and this principle is extended to bonds and other securities for money loaned. The reason," he says, "in which this rule rests is obvious, for such paper is property, and there is no more reason why one may not sell notes which he holds at a price made low either by doubts of the solvency of the maker or by a stringency of the money market, than why he should not be able to sell his house or his horse at a less than the average price. But the purchase must be actual and made in good faith, and not merely colorable and intended to give efficacy to a usurious contract." The case of *Nichols v. Fearson*, 7 Peters, 105, recognizes the principle laid down in the *English* cases that a contract not usurious in its inception cannot be affected by subsequent usurious transactions. That was an action by the indorser against the indorser of a promissory note. It came up before the Supreme Court of the *United States*, from the Court below, upon exception taken to certain instructions given at the instance of the defendant, and to the refusal of the instructions prayed for by the plaintiff. *Johnston, J.*, in delivering the judgment of the Court, says: "The rule of law is everywhere acknowledged that a contract free from usury in its inception shall not be invalidated by any subsequent usurious transactions upon it," and he adds, "The Courts of



*New York* have adjudicated that whenever the note in its inception was a real transaction, so that the payee or promisee might at maturity maintain a suit upon it, a transfer by indorsement on a discount, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill and a valid and legal transaction, but not so where the paper in its origin was only a nominal negotiation." In conclusion he says: "The Court below erred both in the instructions given for the defendant and in refusing those prayed for by the plaintiff." I may here remark that the instructions required to be given on the part of the plaintiff to the jury in that case were to the same effect as those given by His Lordship the Chief Justice in this case, and because they were not given, the judgment of the Court below was reversed.

The case of *Munn v. Commission Company*, 15 Johnson's Reps., 44, lays down the same principle as in the preceding case, that where a bill or note is valid as between the drawer or maker and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an indorser who has discounted it at a higher rate than the legal rate of interest, and he may recover the full amount of the bill or note against the maker or acceptor. But the holder of a bill or note purchased at a discount greater than the legal rate can only recover from *his indorser* the sum which he actually advanced.

The present action not being brought against the plaintiff's indorser but against the maker of the note, he, if entitled to anything, must, as I take it, recover the full amount of the note. We are all of opinion that the case was properly submitted to the jury, and as the evidence produced on the trial well warranted their finding for the plaintiff, we think the verdict is conclusive, and that the rule for setting it aside must be discharged with costs.

WILKINS, J., *dissentiente*.—This was an action brought by *Joseph Wheelock* against *Phineas L. Chesley*, in which the jury found a verdict for the plaintiff, which a rule *nisi* was obtained to set aside. The opinion which I am called upon to give in this case must be in accordance with our own law, and it must be governed by *English* decisions. Authorities derived from

the Courts of the *United States of America* are entitled to our highest respect, but they cannot be regarded as ruling precedents. On the point of inquiry induced in the case before us it is notorious that the latter do not harmonize with the former. As a Judge of a *British Colony*, I must look to the *English* rule as it existed and was judicially reconsidered in *Westminster Hall* when the *Statute of Henry* was in force in *England*, as a corresponding statute is now in force here. The right in this case tested by *English* principle and by the familiar language of Lord *Mansfield*, appears to my mind transparent. The facts lie in a nutshell. *Bent* held a promissory note of the defendant's for £40 19s. 3d. and interest, payable to his wife or to his order six months after date, which was at maturity, in *October* of that year. In *May*, 1868, he, representing his wife, and in concurrence with her, wanting money, applied to the plaintiff, who, though reluctantly, consented to accommodate the *Bents* with £37 for the note, which they indorsed to the plaintiff on receipt of that sum. Thus the plaintiff, not a banker nor one trading in notes, paid £37 for £42 13s. 3d. then due on the promissory note in question, and became entitled to demand and receive from the drawer of the note, with the guarantee of the indorsers, £40 immediately, and interest on £40 until it was paid. Let us now look at a parallel *English* case, reported in 4 *Moore*, 50, *The King v. Ridge*, Lord *Moir* holding one *Ridge's* acceptance of four bills of exchange, each drawn for £1000 by His Lordship, payable to his own order twelve months after date, indorsed the bills, and, desiring to obtain money on them, offered them at the banking house of *Austin, Maunde & Co.*, where he received £3600 for the four bills. In the case before us it was left to us to consider whether the sale of the note was a pretext or cover for usury or a *bona fide* and real sale, and to find for plaintiff or defendant accordingly. In the case from *Moore* it was left to the jury to say whether the transaction before them was merely colorable on the part of the house of *Austin & Maunde*, and was a discounting of the bill, or whether it was a fair and *bona fide* purchase of the bill by them. If the former, to find for the defendant; if the latter, for the plaintiff. After argument of a rule obtained to set aside the verdict for the Crown, (the plaintiff,) *Richards*, Chief Baron, who tried the cause, and so directed

the jury, said : " I confess on reconsideration I think this was an usurious transaction. If Lord *Moir* had gone to *Austin & Maunde*, instead of sending his agent, and said, 'Lend me £3400, and I will give you bills for £4000,' no doubt that would have invalidated the bills." Again he says : "It has been put in argument, also, that the question was fairly left to the jury, as a question of fact, whether this negotiation was a loan or a sale, they being told that in the one case the bills would be bad, in the other they would be good. The effect of that direction would be to leave the question of law to them. Now I think the person who tried this cause, (meaning himself,) ought to have told the jury that under the circumstances of this case the transaction was usurious. It did not occur to me then, as it does now, that this negotiation was tinted with usury ; but I should certainly now direct, if the cause were trying before me, that Lord *Moir* could not be sued on these bills, because they are bad in point of law." *Graham, B.*, "This being clearly a loan to Lord *Moir*, and not a purchase in the market, it was not a question for the jury, and the Judge should have told them it was a transaction which the law did not allow." *Gerrard, B.* : "The confusion which has got into this cause proceeds from it having been at one time considered that these bills were sent about the town to be sold for what could be got for them ; but the fact is that this paper was sent by the maker to those who well knew its present value, to get that value for it, which was done."

Surely, after this, it is unnecessary to pursue the parallel to the point of the application of this case to the decision which we should give, which in my opinion should be that the rule be made absolute, as that in *The King v. Ridge* was.

## IN RE CLYDE COAL AND MINING COMPANY.

A writ of *certiorari* having been issued out of the Supreme Court to the Chief Commissioner of Mines, the Commissioner declined returning or obeying the writ for reasons which the Court held insufficient, and a rule *nisi* for an attachment was thereupon granted. This rule was opposed on two grounds, the second being that the affidavits on which the rule was granted were entitled in the cause.

*Held, WILKINS, J., dissentiente*, that although the writ of *certiorari* had not yet been returned, the matter was already in the Court, and therefore the affidavits were rightfully entitled.

SIR WILLIAM YOUNG, C. J., now, (January 6th, 1870,) delivered the judgment of the Court;—

A forfeiture of the mining leases to this company having been declared by the Chief Commissioner of Mines on the 15th of *January*, 1868, under the *Revised Statutes*, chapter 25, a writ of *certiorari* was issued out of this Court on the 13th of *February* thereafter to the said Commissioner, requiring him to send up the plaint with all things touching the same as fully and entirely as it remained before him. This was founded on an affidavit not entitled in any cause, and bail was put in pursuant to the statute. The Commissioner declined returning or obeying the writ for reasons which we held insufficient, and therefore quashed the return, as it was called, in the last Term. We permitted the writ to be amended at the same time in the return day, but the writ has not yet been obeyed, and still remains in the hands of the Commissioner, and a rule *nisi* for an attachment was thereupon granted in this Term, and has been argued before us. The Commissioner insists, through his counsel, that he is not bound to return the writ on two grounds.—*First*, that it is misdirected, and, *second*, that the affidavits on which the rule *nisi* was granted are entitled in the cause.

As to the first ground, it appears by the authorities to be a sufficient answer if sustained in point of fact. *Archbold's Practice*, 1266; 4 *T. R.*, 499; 2 *Atk.*, 318, which cites the analagous case of a *mandamus* issued out of Chancery to the defendants in their corporate names, and before the return it was moved to quash it because misdirected, for that it ought to have been to the Mayor and Aldermen only, and not to the Mayor, Aldermen and Commonalty of *London*. So in *Ex parte Phillips*, 2 A. & E., 586, the *certiorari* was held to be irregular

because directed to the Clerk of the Commissioners of a Court of Request, who was not himself a Commissioner.

So much for the law. Now as to the fact. By the Acts of 1867, chapter 1, the Chief Commissioner of Mines is entitled the "Commissioner of Public Works and Mines," and had the title so remained in the Provincial Statutes there might have been some difficulty notwithstanding *Mr. Robertson's* recognition of his original title in his affidavit of 17th *December*, 1868, in this same cause. All difficulty, however, is at an end on this point, when we find the Chief Commissioner of Mines described *eo nomine* or as Commissioner of Mines in the Acts of 1868, chapter 1, sections 22, 26 and 30, and chapter 1 of the Acts of 1869, sections 4, 6, &c.

The second objection raises a new point, one at least that does not appear to have been expressly decided. There is no question of the rule that an affidavit before a *certiorari* issue must not be entitled in a cause. This we have already held in *Crawley v. Anderson*, and besides the authorities there cited there are those of *Ex parte Wallwork*, 4 D. & L., 403; *Ex parte Evans*, 2 Dowl., N. S., 410, and many others. The rule is equally imperative that when the cause is in Court the affidavits shall be entitled in the cause or matter, for the two are analagous, as appears from 4 D. & L., 405; *Franks v. Wicks*, 9 Dowl., 490. The question is, can the affidavits be entitled in a cause or matter after the *certiorari* is issued, but before it is in fact returned? No express authority on this point was cited, nor have we found any, and we must govern ourselves therefore by analogy. If the affidavits are wrongfully entitled, in other words, if perjury would not lie on them, there can be no waiver of what is not an irregularity but a nullity, and it is no answer in point of law, though of the strictest kind, that affidavits entitled as in this case have been used by both parties and acted on by this Court without objection, and that the large body of affidavits on file would be rendered utterly useless. On looking to the cases, however we think that we are not obliged to come to this conclusion. In *Perrin v. West*, 3 A. & E., 405, and 5 N. & M., 291, the defendant was removed from the County Jail of *Oxfordshire*, by a writ of *habeas corpus cum causa*, which did not, however, remove the cause to the King's Bench, no writ having been

directed to the Judge of the inferior Court, yet the affidavits were held to be properly entitled in the cause in this Court. "I think," said *Littledale, J.*, "the defendant might entitle the affidavits in the cause in this Court, for the cause is here, though no actual proceedings have taken place in this Court, an instance of which is in *Sowerby v. Woodroff*, 1 B. & Ald., 567. The case of *Hargraves v. Hays*, 5 E. & B., 272, goes still further. There the affidavit for a *capias* was headed in the cause and sworn 17th May, 1855, though the summonses were not taken out till the day after, when the cause was for the first time in Court. Yet the affidavit was upheld. *Per Coleridge, J.*: "The Court is shewn,—is not that enough?" Lord *Campbell, C. J.*: "The names are surplusage and can do no harm. Could not perjury be assigned on this affidavit?" Plaintiff's counsel thought not, but *Coleridge J.*, said: "That objection might possibly be good if the cause were named and not the Court." And Lord *Campbell*, in giving judgment, declared that "he had no doubt that the party might be indicted for perjury on this affidavit. The placing of the names," he added, "of the plaintiff and defendant at the head of the affidavit cannot vitiate,—it gives information and can by no possibility do harm." See also the cases of *In Re Imeson & Horner*, 8 Dowl., 651, and *Allan v. Caswell*, Oldwright, 405.

We adopt the same view in the case in hand and hold that the affidavits are rightfully entitled in the matter which is in point of fact, and has been for nearly two years in this Court. We make the rule absolute, therefore, for an attachment, but without costs, and direct that the writ shall not issue for a fortnight, in the expectation that the writ of *certiorari* will be in the meanwhile duly returned with the record.

WILKINS, J., *dissentiente*.—On the 13th February, 1868, bail having been given, the learned Chief Justice issued his fiat for a writ of *certiorari* in *In Re Clyde Coal and Mining Company*, and on that same day a writ issued, directed to the Honorable Robert Robertson, Chief Commissioner of Mines for the Province of Nova Scotia, whereby he was commanded to send to the Justices of the Supreme Court, at *Halifax*, "a plaint levied in 'our Court,' (meaning, of course, the *Queen's Court*.) before him against the said company, in an application

to forfeit two mining areas, dated 22nd April, 1863, one made to *John Campbell*, and the other to *Alexander Campbell*, which said two leases were, (as in the writ is alleged,) afterwards transferred to the said company, 'with all things touching the same as fully and entirely as it remains in our Court,' before him by whatsoever names the parties may be called therein, together with the said writ."

On the 6th *January*, 1870, no return having been made to the *certiorari*, an order of the Court was made that a writ of attachment should issue against the Honorable *Robert Robertson* for his contempt in not returning the writ of *certiorari* issued in this matter. Pursuant to that order a writ of attachment issued on the 7th of *January*, in the last-mentioned year, which is on file. Its operation was, however, suspended by order of the Court. On the 14th of *January*, 1870, the said *Robert Robertson*, under his hand and seal made a return to the writ, which is on file, together with certain papers and documents therein referred to, and returned therewith. This return substantially shews certain proceedings instituted before the Chief Commissioner under chapter 25 of our *Revised Statutes*, (3rd Series,) entitled "*Of Mines and Minerals*," which resulted in a decision and judgment given by the Chief Commissioner in the matter before him. On the first of *December*, 1870, *Mr. Norman Ritchie*, attorney for the *Clyde Coal and Mining Company*, caused *Mr. Robertson* to be served with a notice. Afterwards, and in the same Term, a motion was made for an attachment to the Court pursuant to that notice. It was founded on an affidavit of *Joseph Norman Ritchie*. The statute referred to in the return, (section 14,) required the Chief Commissioner to investigate the case and decide thereon, and upon his decision pronounced to give notice of it to the lessee or his agent by causing such notice to be served or posted up as in the section is directed. Section 105 provides "that from the judgment of the Chief Commissioner of Mines the party interested may appeal to a Judge at Chambers, in which case the proceedings until final judgment shall be the same in every particular as are in the same chapter provided for in the case of an appeal against the judgment of the Chief Commissioner relative to an alleged forfeiture of a gold mining lease." The provisions thus referred to are found

in sections 74, 75 and 76 of the same chapter. Section 75 limits the time for appealing to ten days from the date of the decision, and an affidavit of dissatisfaction with the decision and security are required to be made and given by section 76, "on such appeal being perfected the Chief Commissioner is required to transmit to the Prothonotary, at *Halifax*, the notes of the testimony taken before him;" and it is further provided that the Judge at Chambers shall confirm or set aside the judgment, or try the cause *de novo*, and make such order thereon as is agreeable to justice and in conformity with law.

The practice and the law relative to the use and application of the writ of *certiorari* in this Province in civil causes are, and ever have been, anomalous and *sui generis*. See vol. 1 of the *P. L.*, p. 287, chapter 9. See also our *Revised Statutes*, chapter 148. It has served the purposes of a writ of *certiorari* or a writ of error, or of false judgment, and indifferently without reference to the stage of the proceedings intended to be removed from an inferior Court, whether the same was or was not a Court of Record. A use and an effect which at common law and according to *English* practice would not attach to this writ have been legalized in this Province by a usage the commencement of which is anterior to living memory. Our *Revised Statutes* assigned to it a peculiar operation to which it is unnecessary particularly to refer. This attachment, if granted, will pre-suppose, of course, that this public officer wilfully disobeyed the mandate of the *Queen's* writ in not returning his "notes of the evidence" and the other matters and things pointed to by the affidavit of *J. Norman Ritchie* as not in fact returned.

My opinion is that it does not sufficiently appear that the Chief Commissioner in respect of what he has returned, considered in connection with what he has *not returned*, has wilfully disobeyed the commands signified by the writ of *certiorari* or any of them, so that we ought to issue a writ of attachment against him and punish him *criminaliter*. He is commanded to return "the plaint" on the matter adjudicated on by him, with all things touching the same, as fully and entirely as it remains before him. Now, unless he must be held to have necessarily understood by the language that he was commanded to return, not merely the record, as we may



call it, that is, all his proceedings up to and including his adjudication, but "the notes of the evidence" on which he adjudicated and the documents mentioned in *Mr. Ritchie's* affidavit, also, he is not in contempt. If these "notes of the evidence" and documents be in point of law included under the phrase "plaint and all things touching the same," and therefore part of his proceedings, (which should have been returned,) still we could not judicially conclude that he had neglected or refused to return them otherwise than from an honest misapprehension of his duty in that respect. If there had been an appeal from his judgment, *the statute* would have informed him that he was required to forward to the Prothonotary, at *Halifax*, the notes of testimony taken before him, but that is not what we are considering now. If, on receiving the writ, he had consulted the book of forms appended to *Tidd's Practice*, he would have found in no case of a return to a *certiorari* in its mandatory part worded precisely as is that directed to him anything but the plaint and proceedings that followed it strictly returned according to the precedents. We understand why this should be so in *England*, but not necessarily so here, our Supreme Court having in certain cases a statutory power given to it to try *de novo* causes brought up by this writ, but as that is anomalous, and as it is at least questionable whether it extends to the particular case, the privilege of appeal not having been received, we cannot assume that he understood an obligation to rest on him different from what the common law would have imposed. *Hawkins* says, (*Pleas Crown*, 295, chapter 27, section 75,) that whatsoever matters are put into the return of a *certiorari* by way of explanation or otherwise *besides those which are expressly ordered to be certified* are put in without any warrant or authority, and consequently shall be no more regarded by the Court above than if they had been wholly omitted. *Viner*, 356. The fact is that oral testimony and documents of evidence used by a Judge in forming a judgment are not parts of the judgment, though in a certain sense they may perhaps be said to be "touching the same."

The course to be adopted in order to obtain a return of what is deficient in the matters returned would appear to me, in view of the question as I have stated, to be somewhat

analogous to that which is pursued in cases of writs of error, viz, to allege *diminution of the body of the record or of its outbranches*. See 2 *Tidd's Practice*, 1167. I say this, of course, on the assumption made at the argument, but which I am by no means prepared to make, that the evidence can be regarded as covered by the words, "Plaint and all things touching the same." It is our familiar practice in cases of *habeas corpus cum causa* where the return does not include the deposition to issue a writ of *certiorari* to the Justice of the Peace to bring these up; and I cannot apprehend any difficulty about pursuing the same course in order to obtain a return from the Chief Commissioner of what is desired by this applicant, if he satisfies the Court that this return is necessary to enable it to do complete justice to the matter before it. When such a writ shall have issued and been directed to this public officer, *distinctly informing him of what is so required*, I cannot bring myself to believe that he will hesitate promptly to obey the *Queen's* commands to send that the requisition of which is so notified to Her Supreme Court of this Province.

I am of opinion that the writ of attachment ought not to issue against the Chief Commissioner of Mines.

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### BRUNDIGE v. DELANEY.

**ACTION** for not accounting in the sum of £200, and also for non-payment of a promissory note for £100. Defendant pleaded fraud and misrepresentation, and that the vessel, the subject of the contract, had not been completed by plaintiff according to the terms of the agreement between them, but was unseaworthy, and also a set-off for expenses incurred in consequence thereof.

It appeared that plaintiff, being engaged in building a vessel, in July, 1864, transferred her while on the stocks to defendant by bill of sale, and at the same time gave him a lease of the building yard. The vessel was completed by defendant, and in July, 1865, was delivered to him, and he signed an agreement to pay for her. There was no warranty required or given, and no proof of any fraud or misrepresentation on the part of plaintiff.

*Held*, that as the defendant had had the fullest opportunity of inspecting the vessel while in progress of completion, and of exercising his own judgment upon her, the maxim *causam emptor applod*, and he was excluded from giving evidence as to her being unseaworthy.

Also, that it was not open to the defendant to impeach the note unless there was a total failure of consideration, his proper remedy for any partial failure being by cross action.

Also, that evidence under the plea of set-off was properly excluded.

DODD, J., now, (January 6th, 1870,) delivered the judgment of the Court:—

The first count in the declaration in this cause complains of the defendant for not accounting with the plaintiff in the

sum of £800 for the hull and spars complete of the brigantine "*Eliza*," which the defendant accepted and took delivery from the plaintiff, but did not pay him the sum of £800. The second count is on a promissory note dated 24th of *October*, 1865, made by defendant to plaintiff for £100 and interest, payable the 1st of *July* then following. The declaration contains also the ordinary common counts in *assumpsit*. The defendant pleaded several pleas, but the fourth and seventh, (the pleas of set-off,) are the only ones necessary to refer to for the adjudication of the cause. The fourth plea says that the promissory note mentioned in the declaration was given on account of the brigantine "*Eliza*," that the hull and spars of the said vessel were not complete when delivered to defendant; that the said vessel was unseaworthy and unfit for the service for which she was intended, of which the defendant was entirely ignorant; that the plaintiff fraudulently concealed from defendant the true character of the vessel and allowed and induced him to believe the said vessel to be seaworthy in accordance with the said agreement in respect thereof, but which she was not. The seventh plea charges the plaintiff for costs and expenses incurred in and about divers suits in defending the same arising from the unseaworthiness of the said vessel, and the caulking thereof, and defended and contested by the defendant at the request of plaintiff, and for caulking and repairing the said vessel for the purpose of making her seaworthy. In his particulars for these services for the first he charges £60, and for the second £125.

The case would depend upon whether the defendant should have been allowed to give evidence at the trial to sustain these two charges. Under the rule granted and argued this Term the sole question was the rejection of such evidence. The plea of fraud and misrepresentation entirely fails, there being no proof that the plaintiff was aware that the vessel was not seaworthy, neither was there proof of warranty that she was so. The agreement signed by the defendant was as follows:—"I hereby agree to account with *Howard Brundige*, (plaintiff,) in the sum of £800 for the hull and spars complete of the brigantine '*Eliza*,' at present at *Pugwash*. Dated 6th *July*, 1865." It will be seen that there is no warranty in this agreement. The hull and spars were to be complete, that is to say,

finished, but how or in what manner we have not a word on the subject. The plaintiff, in his evidence, says the vessel was delivered to defendant the same day the agreement is dated. She was then loaded, and went to sea the next morning, the defendant, obtaining the registry, taking the title to her. Plaintiff having previously, on the 1st of *July*, 1864, given him a bill of sale when the vessel was on the stocks and unfinished, at the same time he gave him a lease of the yard in which she was building. The vessel was rigged and loaded by defendant, so that he must have had control of her for some time before, when the plaintiff says he delivered her to him. The vessel was caulked by *Elliot* and paid for by defendant, but there is not any positive evidence that he was employed to do the work by defendant, but the presumption is in favor of it, as he was sued by *Elliot*, and makes the charge of defending the suit to the plaintiff, in which judgment went against him. At nearly the close of the plaintiff's evidence the counsel for the defendant attempted to cross-examine him in respect of the failure of the consideration in respect of the vessel not being what she was represented to be when received by him, but incomplete in view of the agreement, and that in consequence a large sum of money was paid by defendant upon the arrival of the vessel in *Boston* in repairing her. The Judge refused to admit the evidence, and that is the point now for our decision.

The defendant was examined on the defence and his evidence does not in the least vary that of the plaintiff respecting the sale and purchase of the vessel, in fact, he is silent on the subject as to the terms upon which he did purchase, and made no charge of fraud or misrepresentation upon the part of the plaintiff in support of his fourth plea. In the first place, the agreement for the purchase of the vessel only binds the plaintiff to deliver the hull and spars complete, no warranty, as I have already said, and no fraud or misrepresentation as respects the sale and condition of the vessel, and therefore unto such a case under the agreement, with the opportunity the defendant had of inspecting the work in its progress, that would not apply. The principles that control and govern cases of this kind are familiar to the Court, and were much examined in the case of *Fraser & Paint v. Salter & Twining*, in this Court a year or two ago, where the goods are *in esse* and may be

inspected by the buyer and there is no fraud in the settling, the maxim "*caveat emptor*" applies, even though the defect which exists in them is latent and not discoverable on examination, at least when the seller is neither the giver nor the manufacturer. *Parkinson v. Lee*, 2 East, 314. The commentary on this case in *Jones v. Just*, L. R., 3 Q. B., 197, is that the buyer has the opportunity of exercising his judgment upon the matter, and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of a contract of sale that the goods are of a particular quality or are merchantable.

The plaintiff in this case was the builder, and the law from *East*, if the defects were in the hull and latent, would be in favor of the defendant; but he, (the defendant,) from some time in 1864, to a large extent, had the control of the vessel during the time and until she was finished. She was in his own yard, and he employed the caulker and paid him, and, therefore, to a large extent, may be viewed as one of the builders himself; certainly he had ample opportunity to examine and inspect the caulking during its progress, if so disposed, and this consequently brings him within the maxim *caveat emptor*. Where a manufacturer undertakes to supply goods manufactured by himself, but which the vendor has not had the opportunity of inspecting, it is an implied term of the contract that he shall supply a merchantable article. *Laing v. Fidgeon*, 4 Camp., 169. And this doctrine has been held to extend to the sale by a builder of an existing barge which was afloat but not completely rigged and finished. There, inasmuch as the buyer had only seen it when rigged and built, *and not during the course of building*, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use. *Shephard v. Pybus*, 3 M. & G., 868. Had the buyer in that case the opportunity that the defendant had in this, there would have been no implied term in the contract that the barge was reasonably fit for use, it is therefore a case directly in point with that under consideration, for here the defendant had the opportunity of inspecting the vessel from *July, 1864*, during the course of building and loading, to *July, 1865*, and

therefore no implied contract as to the character of the vessel beyond that the hull and spars were to be complete. If my view of the law is correct, then the defendant is properly excluded from giving evidence as to the vessel not being seaworthy, failing in proof as he did of fraud or misrepresentation on the part of the plaintiff.

But there is another point here for excluding the evidence too clear to admit of a doubt. The consideration of the note declared upon was in part payment for the vessel, which the defendant wished to impeach upon the ground that the plaintiff had not complied with the terms upon which the vessel was sold. The cases are numerous to shew he cannot do so, but is left to his cross action. Where the defendant accepted bills for goods supplied on a contract to be of good quality and moderate price, *held*, that it was no answer to an action on the bills, that the goods turned out to be of inferior quality, and that the defendant had paid the plaintiff much beyond what they sold for. In an action for the price the value only can be recovered; but in an action on the security the party holding it is entitled to recover, unless there is a total failure of the consideration; 1 *M. & M.*, 483. Even the forcible retaining of goods two months after the sale is no defence to an action on a bill given for the price of the goods.

The cases have completely established the distinction between an action for the price of goods and the action on the security given for money. In the former the value only can be recovered; in the latter the party holding the bills given for the price of the goods supplied can recover on them, unless there has been a total failure of the consideration; if the consideration fails partially, as by the inferiority of the articles furnished, the buyer must seek his remedy by a cross-action. *Addison on Contracts*, 200, who cites *Morgan v. Richardson*, 1 Camp., 40, and *Tye v. Gwynne*, 2 Camp., 348.

We are therefore of opinion that the Judge properly rejected the evidence at the trial, and that the rule for a new trial must be discharged with costs.

## MCNEIL v. MCINTOSH.

A PROMISSORY note was duly stamped, but the maker had, by way of cancelling the stamps, simply written his initials upon each stamp, without adding the date.  
*Held* a sufficient cancellation.

YOUNG, C. J., now, (January 6th, 1870,) delivered the judgment of the Court:—

This is an action by the indorsee against the maker of a promissory note for \$600, made in *April*, 1868, and payable at three months after date, to which the defendant pleaded that he did not make, and that the payee did not indorse the note. The making and the indorsement having been proved, the defendant's counsel then objected that the stamps upon the note had not been duly cancelled, as required by the Dominion Act of 1867, chapter 9, and the point has been argued before us during the present Term. The stamps are nine in number, amounting to 18 cents, and are each marked with the initials of the defendant's name, "*D. McI.*," but without date, and the question is whether this is enough.

This is the first time we have been called on to examine the *Stamp Act*, and we found its construction a matter of some difficulty. To prevent a stamp once affixed to an instrument from being thereafter used, the maker of a note or drawer of a bill in *Canada* must take care that upon the stamp his signature or part of the signature, or his initials, on some integral or material part of the instrument shall be written, so as (as far as may be practicable) to identify each stamp with the instrument to which it is attached, or the person affixing such stamp shall, at the time of affixing the same, write or stamp thereon the date at which it is affixed, and if no integral or material part of the instrument, nor any part of the signature of the maker or drawer be written thereon, nor any date be so stamped or written thereon, or if the date do not agree with that of the instrument, such stamp shall be of no avail, and such instrument shall be invalid and of no effect in law or in equity.

It will be perceived that these enactments, which are to be found in the 4th and 11th sections, are of the most stringent character, and they affect the validity of every promissory

note and bill of exchange for \$25 or upwards made or drawn in this Province since the passing of the act on the 21st of December, 1867. See the case of *Pooley v. Brown*, 11 C.B., N.S., 566. Innocent holders under the circumstances in the 12th section may protect themselves, however, by paying a double duty, that is, by affixing stamps of the value of 36 cents in place of 18, as in this case, the latter being about one-third of the *English* rate.

It was thought upon the argument that there was an omission or an inconsistency between the second and fourth clauses of the 4th section and the reference to the initials of the name in the 11th section, but on a more attentive consideration the inconsistency disappears, and comparing these sections with those in the *English* acts, printed in the appendix to *Byles on Bills*, pages 501, 505, 506 and 519, the true construction appears to us to be that the maker or indorser must write his signature, or part of his signature, or his initials, (as a part of such signature,) on the adhesive stamp, or write or stamp thereon the date. There is no difficulty in doing this where but one stamp is used, and the obligation of doing it, which is very little known in our Province, is understood. But there is a difficulty, where, as in this case, there are nine stamps, and the actual signature cannot extend to all. To require a date upon each, unless in the banks, in some if not in all of which the date is stamped, would be an immense labor and practically could never be enforced. The only solution, therefore, as we think, though we adopt it with some hesitation, is that the initials of the maker or drawer upon each stamp, written by himself, shall be taken as part of the signature, and holding this, we think the cancellation of the stamp in this case sufficient. It will be safer, however, to write or stamp the date of its use upon the stamp itself. It was further urged by the plaintiff's counsel that the objection should have been pleaded, but having decided the main question in his favor, it was unnecessary to determine this point, and we discharge the rule and give judgment for the plaintiff with costs.



## LATE v. McLEAN ET AL.

GRASS still growing and not yet cut does not come under the description of goods and chattels, and cannot be seized and sold under execution.

YOUNG, C. J., now, (January 6th, 1870,) delivered the judgment of the Court:—

This is a demurrer to the fourth plea in an action of trespass, justifying the entry on plaintiff's lands and mowing the grass thereon growing, under a Magistrate's execution against the plaintiff and a sale of the grass thereunder. The plea avers that the judgment was recovered 20th *September*, 1866, and the execution sued out 20th *July*, 1868, without alleging an affidavit therefor, as required by *Revised Statutes*, chapter 128, section 26. The execution is not even said to have been "duly" sued out, which might perhaps have sufficed, and we think, therefore, that this objection must prevail. But as we were told at the argument that it might be cured by amendment on the usual terms, our judgment was required on the second and more material objection in the levy of the execution on grass before it was cut. Numerous cases were cited and the doctrine of emblements largely gone into, which we do not think it at all necessary to follow. Whatever goes to the executor and not to the heir may be taken under a *fiery facias*. At common law *fructus industriales*, as they are called, that is, the fruits of industry, such as growing corn and grain of all kinds, everything, in the quaint language of the law, "of an artificial and annual profit that is produced by labor," as hemp, flax, clover, potatoes, &c., while growing or garnered, go to the executor, and therefore may be taken in execution. But a crop of natural grass, growing at the time of the death of a tenant for life, or in fee, though it may be fit to cut for hay, does not belong to the executor, but goes to the remainder man. 1 *Chitty's General Practice*, 91; *Williams on Executors*, 631; *Tidd*, 1001; *Archbold*, 12th Ed., 656. In *England* clover, rye, grass, or artificial grass growing under corn, cannot be seized, but this is by statute. In the leading case of *Evans v. Roberts*, 5 B. & C., 829, *Bailey, J.*, said: "Growing grass is the natural and permanent product of the land, renewed from time to time without cultivation, and does not come within

the description of goods and chattels. It cannot be seized as such under a *fi fa*, for it goes to the heir and not to the executor." So also in *Brown on the Statute of Frauds*, section 250.

It is perfectly clear upon these authorities that the second objection to this plea must also prevail, but the question having come before us for the first time, we recommend it to the attention of the Legislature. They will probably be surprised to learn that growing crops of any kind could be lawfully seized and sold under a Magistrate's execution, and it will be for them to consider whether the law as it is now declared ought not to be amended.

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### BLAKE v. STEWART.

In an action for money had and received, the defendant pleaded, by way of set-off, a promissory note given by plaintiff to defendant. From the evidence it was apparent that the transactions between the parties out of which the present cause of action arose were intended to defraud the creditors of plaintiff, and that plaintiff and defendant were *in pari delicto*.

Held, that such being the case, the plaintiff should not be aided by the Court in enforcing his contract, and the verdict for him must be set aside.

DODD, J., now, (January 6th, 1870,) delivered the judgment of the Court:—

This is an action for money had and received. The declaration also contains the money counts, and the account stated and settled. The defendant pleaded several pleas. 1st, never indebted; 2nd, that the plaintiff being indebted to him on a promissory note in the sum of \$700, he (defendant) credited in said note the amount of plaintiff's claim before the commencement of the suit; 3rd, set off of a promissory note made by plaintiff and payable to defendant or his order for \$700 and interest. To the second and third pleas the plaintiff, for an equitable replication, says the said promissory note was given by plaintiff to defendant in trust.

The issues raised by the equitable replication, it becomes unnecessary to refer to, as the evidence at the trial entirely failed to establish them. This case mainly rests upon the testimony of the plaintiff, the defendant admitting he had received \$396.25, the proceeds of plaintiff's goods after paying plaintiff's wife \$20 thereout, defendant claiming the goods

under a bill of sale, not given in evidence. There was not any evidence for the defence, notwithstanding the defendant was in Court during the trial, but not called. I may therefore fairly presume the evidence of the plaintiff could not be contradicted by the defendant, and, if under these circumstances, he has legally shown himself to be entitled to this verdict, it cannot be disturbed.

At the argument of the cause during the present term, it was contended on the part of the defendant that the bill of sale and promissory note had been given as a cover to defend the plaintiff's creditors, and I think it was admitted that if he was *in pari delicto* with the defendant, then the verdict could not be retained. His Lordship the Chief Justice told the jury that the plaintiff had given and the defendant accepted the promissory note for a fictitious debt, with the view either of retaining a dividend or covering the whole property as against the creditors. He said there was a mutual fraud, and the question was whether the two parties were to be considered *in pari delicto* or if the plaintiff could bring himself within any of the exceptions in the books. The jury found for the plaintiff.

Let us now turn to the evidence and ascertain if the jury were correct in their finding. The plaintiff says he never was in any sense indebted to defendant; that he made the note for \$700 after the bill of sale; that it was made at defendant's request, and as he, plaintiff, supposed, to secure himself against plaintiff's creditors, he was to appear as one of the creditors, and would have been liable, having the bill of sale of the property, unless that note had been given to show a debt existing as the consideration of the bill of sale. The note was written by the plaintiff. It is not necessary to make further extracts from the plaintiff's evidence, as there is not anything in it to vary or alter those that I have made. The whole, in fact, coming from his own mouth, proves a pre-concerted intention jointly with the defendant to commit a fraud upon his creditors. Fraud was the inception of the contract, and the plaintiff subsequently paying his creditors does not change or vary it, but the fraud continues attached to it. Public policy, which is the foundation of the law, excludes the plaintiff from obtaining the aid of the Court to

enforce a contract wrongfully entered into. There are a class of cases where fraud is on one side only, there where money is paid under those circumstances it may be recovered back; but there is no case that I can find in the books, and I have been very diligent in my search, where the plaintiff and defendant are in *pari delicto*, that the law will sustain an action like the present. Money extorted by duress of goods, detainer of deeds, or, in the words of Lord Mansfield, by any undue advantage taken of the party's situation, contrary to law made for the protection of persons under those circumstances, can be recovered back in an action for money had and received; *Moses v. McFarlane*, 2 Burr., 1007. But no contract can arise out of a fraud, and an action brought upon a supposed contract which is shewn to have arisen in fraud, may be resisted; *Parkerson, J., in Campbell v. Flemming*, 1 A. & E., 42. The same opinion is expressed by *Holroyd, J., in Batson v. Donovan*, 4 B. & Ald., 34, and by Lord Mansfield, in *Gibbon v. Paynton*, Burr, 2300. The law implies a promise to refund money had and secured under an illegal contract, where the plaintiff, seeking to recover such monies, does not stand in *pari delicto* with the defendant, from whom it is sought to be recovered. *Addison on Contracts*, 236. When a contract or deed is made for an illegal purpose, a defendant against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff, and a Court of Justice will decline its aid to enforce a contract thus wrongfully entered into. An unlawful contract, it has been said, can convey no rights in any court to either party, and will not be enforced at law or in Equity in favor of one against the other of two persons equally culpable. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act, if from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law, if in the country. *Broom's Legal Maxims*, 710.

Having, as I conceive, clearly shown from the evidence of the plaintiff, that the fraud was mutual in the case between him and the defendant, and the cases I have referred to, showing that under such circumstances he cannot claim the aid of

the Court to enforce his contract, therefore a rule for a new trial must be made absolute with costs.

I have omitted to refer to a point taken at the argument by the counsel for the plaintiff, that the defendant was excluded from shewing fraud in the transaction by not pleading it. But in an action like the present, fraud may be proved under our law without plea, in answer to any matter not upon the record ; therefore the objection fails.

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### BELLONI v. SYDNEY & LOUISBURG RAILWAY CO.

THE provisions of the *Practice Act* which enable proceedings to be taken in the Supreme Court against a defendant abroad after service do not extend to suits against corporations.

WILKINS, J., now, (January 6th, 1870.) delivered the judgment of the Court :—

On the 17th *September*, 1868, the writ in this case issued out of the Supreme Court at *Halifax*, addressed to the *Sydney & Louisburg Railway Company*. It alleges a contract made, after the said company became incorporated, for the purpose of building a railroad from *Sydney* to *Louisburg*, with the plaintiff. The writ also contains the common counts. It is directed to be served within three calendar months, and is indorsed "for service out of the jurisdiction of the Court." It appears to have been served at *Boston, U. S.*, on the 7th *October*, 1868, on *James W. Emery*, as the President of the said Company, by delivering to him a copy of the writ and exhibiting to him the original.

On the 7th *May*, 1869, *Mr. William A. Henry*, in an affidavit made for the purpose of changing the position of this cause on the docket, states that he had been retained by defendants, as their counsel and attorney, to defend the cause, his affidavit distinctly referring to the writ and its alleged service at *New York* on the 7th of *October*, 1868, as appearing by the affidavit of service. The place of service so stated by *Mr. Henry* is obviously a mistake for *Boston*. *Oliver C. Morton*, of *New York*, in his affidavit made at *Halifax* on the 15th *May*, 1869, states that he is one of the defendants ; that

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he is acquainted with *Emery*, above-named, and that at the time of the alleged service of the writ on him he was not President of the Company, nor a Director or other office-bearer thereof. On the 30th *April*, 1868, the plaintiff, by his affidavit on file, swore to the indebtedness of the defendants in \$10243.81, stating the grounds thereof, alleging also the incorporation of the Company and the purpose thereof as stated in the writ, and their contract as therein alleged; also, that the defendants are a body incorporated by an act of the Legislature of *Nova Scotia*; that *Emery* is President of the said Company, which has no authorized agent resident in this Province; also that at the time of the contract the deponent was resident in *Nova Scotia*. It appears by the affidavit of *Joseph N. Ritchie* that on the 25th of *May*, 1869, no appearance or pleas had been put in by the defendant.

On the 10th of *May*, 1869, *Joseph N. Ritchie* states in his affidavit that after service of the writ in this cause he received a letter from *James W. Emery*, the President of the *Sydney & Louisburg Railway Company*, the defendants, informing him that he had applied to *Mr. Henry* to defend this suit; that when this cause, being on the docket of causes for trial, was called on the first day of the Spring Sittings at *Halifax* of that year, some person, who he believed to be *Mr. Daly*, the partner of *Mr. Henry*, on the part of the defendant, answered that it would be for trial; that *Mr. Henry* promised from time to time to appear and plead, but had not done so.

On the 20th *July*, 1869, *Mr. Norman Ritchie* and the plaintiff made an affidavit in this cause in which the plaintiff stated that *Emery* was elected and was President of the Company when the writ issued, and that the signature subscribed to a certain letter annexed to his affidavit was the true signature of the said *Emery*, while the body of the letter was entirely in his the said *Emery's* handwriting. *Ritchie* stated that the letter so annexed had been received by the firm of *J. W. & J. N. Ritchie*, by mail, on or about the 9th of *December*, 1868. The letter of that date addressed to the last-mentioned firm, and signed by *Emery*, states that he had written to *Messrs. Henry & Daly* to enter an appearance in the suit of *Belloni* against the *Sydney & Louisburg Railroad*, but no

answer had been received from them. It further states that the writer intended to defend the action. It concludes by desiring to be informed whether *Mr. Henry* had attended to the action, and how the matter then stood. This letter is subscribed *James W. Emery*, President *S. & L. R. R.* Here it may be observed that it is in direct contradiction to the above-noticed affidavit of *Morton*. This company was incorporated by an act of the Legislature, (chapter 50,) passed in the year 1865. The act provides for the appointment by the Company of a recognized Agent or Manager resident in this Province, and that in default of such appointment, or in case of the absence or death of such, if appointed, process may be served on any officer of the Company, or for want of such officer, may be posted on some principal building of the Company. In this state of law and facts, *Mr. Ritchie*, on behalf of the plaintiff, has moved the Court for leave to proceed in the cause under the provision of section 1 of part the second of chapter 134 of the *Revised Statutes*. Having been heard in support of his application, it was opposed by *Mr. Henry*, who read and relied on two affidavits, viz., that made by *Henry Day*, at *New York*, on the 30th of *November*, 1869, and that of the above-named *James W. Emery*, made at *Boston*, on the 10th of *December*, 1869. As this defendant Company was incorporated by the Legislature, and as the incorporating act made certain persons therein named, and among others this plaintiff and the said *James W. Emery*, and such others as should become shareholders, a body politic, "by the name of the *Sydney & Louisburg Railway Company*," (by which name the defendants are sued,) for the purpose specified in the act, and as the act specifies no conditions to be performed by the persons so incorporated as precedent to their incorporation, we must consider the said Company as properly made defendants in this cause. We therefore, having regard to the sole question now before us, viz., whether the defendant Company is a subject of the provisions of the section of our *Practice Act* last referred to, and whether, if it is a subject thereof, it is duly before the Court, so as to warrant our authorizing the proceedings applied for, dismiss from our consideration everything set forth in the two last-mentioned affidavits which is to the effect that if the defendant was regularly before the Court

it would not be liable for the contract alleged in the plaintiff's writ.

Separating from them the matter thus referred to, which could only be important as matter of defence, the only matters affecting the question before us which they contain are as follows :—*Day* states that the functions of the President of the *Sydney & Louisburg Railway Company* ceased before the service of the process herein on *J. W. Emery*. *Emery*, in his affidavit, admits that he was chosen President, though, after a meeting in *October, 1865*, he never, to his recollection, acted as President, adding that he certainly had no authority to act for or to bind the Company in any way, and never undertook to do so. He attempts to explain away as an act of inadvertence the manner in which he subscribed the above-mentioned letter to the *Messrs. Ritchie*. In view of the facts we are of opinion that there is satisfactory proof of this writ having been served, at *Boston*, on the *7th October, 1868*, on *James W. Emery*, and that he was at the time of such service President of the defendant Company, a Company incorporated by our Legislature, and then existing as such. Comparing sections 1 and 2 of part the second of our *Practice Act* with the two corresponding sections of the *English Common Law Procedure Act* of 1852, not being unmindful of the peculiarities which mark our legislation in regard to foreigners incorporated for purely internal purposes as respects our own Province, and believing that if the mind of our Legislature had been directed to the consideration of the particular matter, they would probably have so worded our provisions in question as to make them comprehend the case before us, we yet feel ourselves pressed by the authority of *Ingate v. Lloyd Austriace*, 4 C. B., N. S., 704. It is true the decision is that the 16th, 18th and 19th sections of the *English* act do not apply to the case of proceedings against a foreign company carrying on business abroad, (which is not the case that we are dealing with,) but the principle of the decision and the reasoning of the Judges who decided it go the full length of determining that the *English* legislation in question, introduced as a substitute for proceedings to outlawry which were personal, was not designed to extend to cases that did not admit of personal service strictly on the defendant or defendants in the suit. It is quite true that some of the remarks



thrown out by the learned Judges of the Common Pleas during the argument have a different aspect, but the general scope of the reasoning and the point of the observations unmistakably indicate as the very ground of decision that the Legislature contemplated as defendants to be operated on natural persons only.

*Willes, J.*, says : " The 17th and 18th sections were introduced as a substitute for the old proceeding to outlawry which could only be against natural persons." *Williams, J.*, says : " The spirit of the act then is, that there must be personal service or something that is equivalent to it." *Cockburn, C. J.* : " Before we can give leave to proceed, we must be satisfied that this jurisdiction, which is a mere creation, applies to foreign corporations." The words of that learned Judge, in his judgment, shew that his difficulty was with regard, not only to foreign, but to all corporations not provided over by section 16. The learned Chief Justice used these words in his judgment which are unmistakable. He says : " Looking at what the law was before the passing of this act, it seems to me perfectly clear that these provisions refer only to individual defendants and not to corporations."

I do not think it is competent for us to hold in the face of the decision and the reasoning on which it is avowedly founded, that the decision does not, in view of all or any of the peculiarities of our legislation, impose on us an obligation to construe the parallel words of our act as the Court of Common Pleas has construed the *English* statute. In my view of the question it is one of doubtful intention, which it is better for us to leave to the Legislature to clear up by an express declaration of what it intended. The principle of the judgment of the Court of Exchequer in *Forbes v. Smith*, 10 Exch., 717, would have a most important bearing on the question before us if there had been an appearance actually rendered by the defendant Company. It may hereafter apply, however, and see *Williams v. Strahan*, 1 B. & P., N. R., 309, cited in *Alsager v. Crisp*, 9 Dowl., 353.

## KINNEAR v. HARRISON.

In an action of ejectment defendant pleaded an equitable plea setting out certain deeds as the links in his title. At the trial plaintiff sought to attack one of these deeds on the ground that it was without consideration and a fraud on third parties.

*Held*, that plaintiff should have replied, alleging the fraud, and not having so pleaded could not adduce it in evidence.

The defendant had been for some time in possession of the property in suit, and had made large payments to the parties through whom he claimed, beside outlays in improvements.

*Held*, that having by his plea placed himself under the equitable jurisdiction of the Court he should be protected to the extent of his actual payments and outlays.

YOUNG, C. J., now, (January 6th, 1870,) delivered the judgment of the Court :—

This is an action of ejectment in which the plaintiff claims under a Sheriff's deed dated 17th *February*, 1868, founded on a judgment of *Mursters v. Chappell*, registered 28th *May*, 1858. *Chappell* had mortgaged the land to the late *James Stewart* for £250, 24th *May*, 1855, and he conveyed his equity of redemption to *Cornelius Turner*, 5th *December*, 1856. *Turner* conveyed the land to *Charles R. Harrison*, the defendant, 15th *October*, 1864. Besides the ordinary plea, the defendant put in a plea on equitable grounds setting out the deeds of *Chappell* to *Turner* and *Turner* to himself, and a payment by the defendant of the amount due on the mortgage which was then discharged. The plea further averred a payment by the defendant to *Turner* of \$309, exceeding the amount mentioned as the consideration thereof, and a further expenditure by the defendant of \$80 in improvements. The defendant then claimed the protection of this Court for the sums so paid by him with the interest thereon and his costs, and prayed that the plaintiff might be restrained from prosecuting his action, and that he might have such other and further relief as equity and good conscience might require.

The cause was tried on these pleadings before Mr. Justice WILKINS, in *June* last, when the plaintiff wished to attack the deed from *Chappell* to *Turner*, on the ground that it was without consideration, and a fraud on *Masters*, whose debt accrued in 1855, and in *November*, 1866, before the execution of the deed, stood at £86 5s. Here a difficulty arose. Had there been no equitable plea it would have been clearly competent for the plaintiff to have shewn fraud in this deed under

the *Practice Act*, section 80, though not pleaded, but the deed to *Turner* being upon the record in the equitable plea, though that plea in itself was no legal answer to the plaintiff's title, the Judge thought that the plaintiff ought to have replied to that plea alleging fraud, and in that view we are disposed to concur with him. It is perfectly clear that the plaintiff was entitled, and we think, therefore, that he was bound, to reply fraud. This disposes of the legal issue, the registry of the deed to *Turner* preceding by a year and a half the judgment of *Marsters*. But we must not deal with the legal issue alone, Here is an equitable issue invited by the defendant, which has had the effect of excluding some important parts of plaintiff's evidence, but has let in some that is also very important. It appeared on the trial that *Turner* is the brother-in-law, and the defendant the step-son of *Chappell*; that *Turner*, in fact paid nothing for the land, never was on the property, and never exercised acts of ownership on it, and conveyed it to the defendant by order of *Chappell*.

The defendant, at the date of the deed in 1864, was a lad of about 14, and having great energy of character, made considerable sums of money by his own industry and management, with which he paid off the mortgage in whole or in part, and paid further sums to *Turner* and in outlays on the farm. We think, therefore, that *he ought to be protected to the extent of his actual payments and outlays*, and that we ought to exercise the equitable jurisdiction which the equitable plea has given us. We direct, then, a reference to a Master, to ascertain and report at what periods and out of whose funds the *Stewart* mortgage was paid off, what sums were actually paid, and under what circumstances, by the defendant to *Turner*, what sums the defendant has laid out on, and received from the land since 1864, the amounts due on *Masters* and *Casey's* judgments, with interest and executions thereon, specifying the particulars and what the land in the judgment of the Master is now worth, the Master to have the usual powers, and either party to be at liberty to apply to a Judge on the report for a final order, the costs of the action and of the reference to be determined by the final order. The order of reference is to be submitted to the Court or a Judge, and if not filed within thirty days, the defendant to have judgment on his verdict with costs of suit and argument.

## RAND v. FLAVIN.

AFTER the Court, with full knowledge that a writ of *certiorari* had not been returned, received affidavits on the part of plaintiff entitled in the cause, and granted a rule *nisi* thereon, and defendant appeared by counsel and resisted the rule upon an affidavit of defendant's, also entitled in the cause,

*Held*, that it was too late to raise the objection that the cause was not properly before the Court, and that the Court had no power to adjudicate thereon.

DESBARRES, J., now, (January 6th, 1870,) delivered the judgment of the Court:—

This was an application for leave to issue an execution against the defendant on a conviction made against him before *J. R. Hea* and *Simon Fitch, Esqrs.*, Justices of the Peace for the County of *King's*, for selling intoxicating liquors without license, in contravention of chapter 19, *Revised Statutes*, by which a penalty of \$50 for the second offence was imposed upon the defendant, and \$8.92 costs, on the 2nd *February*, 1867. A writ of *certiorari*, addressed to the said Justices of the Peace, was issued on the 7th of *February*, 1867, commanding them to send to the Justices of the Court here the plaint levied before them the said Justices of the Peace by the plaintiff against the defendant, with all things touching the same, on the first day of *July* then next. That writ, without any return made thereon, was filed in the office of the Prothonotary of this Court on the 8th *April*, 1868, and on the 19th *May*, 1868, a rule *nisi* to the effect above mentioned was granted on an affidavit of the plaintiff and also an affidavit of *Edwin D. King*, his attorney, returnable within the first four days of the then next *July* Term of this Court. The case was argued before us during the present Term, when the following objections were taken by defendant's counsel against the rule:—

1st. That this cause, for want of a return to the writ of *certiorari*, was not properly before the Court.

2nd. That the cause not being properly before the Court, no execution can legally be issued thereon.

The same answer may be given to both of these objections, and that is that the Court having, with full knowledge of the fact of the writ of *certiorari* not being returned, received affidavits on the part of the plaintiff entitled in the cause, and granted the rule thereon, and the defendant having through

his counsel appeared before the Court and resisted the rule upon an affidavit made by the defendant and entitled in this cause, it is now too late to raise these objections and to insist that the cause is not before the Court, and that after all the proceedings taken on both sides, we have no power to adjudicate upon it. Not for a moment doubting the power of the Court to deal with this case as it is, I will now briefly state the view I entertain of it. The case of *Woodcraft v. Kinaston*, 3 Atk., 317, appears to me to be in point and to be a case from which we may learn the course that ought to be pursued in the present case. In that a motion was made to quash or supercede a writ of *certiorari* which issued out of the Court to remove a plaint of replevin in the Mayor's Court of the City of London. It was objected that the writ was bad because the tenor of the record was only to be removed, but not the record itself. The Lord Chancellor having expressed the opinion that the certificate was erroneous, said: "The question then is whether I ought to quash or supercede this writ. I am of opinion that I cannot quash it; but must supersede it, for I cannot quash it but on view of the record itself, and so must wait for a return. This," he says, "came in question in the great case of *Joseph Sharp* and the Mayor, Aldermen and Commonalty of London, in the latter end of Queen Anne's time, in the Court of King's Bench. A *mandamus* issued to them by corporate names, and before the return it was moved to quash it because misdirected, for that it ought to have been the Mayor and Aldermen only. This case was argued and the Judges differed in opinion, but Mr. Justice *Eyre* took an objection that the Court could not quash the writ *because it was not before them as not being returned*, and that it must be superceded only. And the whole Court were unanimously of opinion in this respect, though they differed on other points. Ordered that the writ be superceded and a *procedendo* awarded."

Now I think that what was ordered to be done in that case may very safely be done in this, and considering the delay which has taken place in consequence of the using of the writ of *certiorari*, professedly with the view of removing the proceedings had before the Justices of the Peace, but which, owing to causes which it is difficult to understand, has never been acted upon, it would be a denial of justice to hold that

we have not the power, under the circumstances, of directing an execution to issue for the enforcement of the penalty and costs awarded to the plaintiff under a conviction which, up to this moment, has never been impugned. The case of *Linden v. Shiels*, 3 Dowl., 90, in which there was an application to quash a *certiorari* and issue a *procedendo*, shews that wherever this writ has been sued out for the purpose of delay, the Court will quash the writ. It appears that the ground of the application in that case was that the *certiorari* was issued for the purpose of delaying the plaintiff, and that it was therefore an abuse of the powers of the Court. *Littledale, J.*, in delivering his judgment, says: "I take it that every person is entitled to a *certiorari* as he is to a writ of error, and the Court will take care that its powers shall not be used for improper purposes." He remarks that some years ago writs of error were more frequent than of late years, and there was no doubt that many of those sued out were in fact for the purpose of delay, yet he says the Courts would not quash or set them aside, or permit execution to be issued unless there was an admission of the party, or something tantamount to it, that they were issued for the purpose of delay.

Looking at the facts of this case as disclosed in the affidavits before us, I may say that although there is no admission that the writ was used for the purpose of delay, yet when I find that it remained in the hands of the Magistrates to whom it was directed more than a year without any effort being made on the part of the defendant to have it returned, and that when sent to the office of the Prothonotary to be filed without any return upon it, no application was ever made to the Court to enforce obedience to it, I think there is great reason to presume that in suing out the writ of *certiorari* in the present case the object of defendant was delay. In *Stacey v. Evans*, 13 Price, 449, a *certiorari* to remove a cause from the Great Sessions of the County of *Cardiff* was superceded on motion to the Court, and a *procedendo* ordered, and the costs of the day in the Court of Great Sessions and the costs of the application ordered to be paid by defendant.

I am therefore of opinion, in view of the cases to which I have referred and a consideration of all the circumstances of this case, that the rule ought to be made absolute with costs.

## MCSWEENEY v. WALLACE ET AL.

DEFENDANT, a Barrister, being in partnership with J. G. T., the firm, as Solicitors for Mrs. McS., collected certain large sums of money, which, instead of paying over to her, they appropriated to their own use. Plaintiff having brought action for the amount, the matter was referred to arbitration, and an award made in her favor, which defendant now sought to have set aside, mainly on the ground that the award was unjust and incorrect, because defendant was held liable for the total amount received by the firm, instead of, as he contended, only for the amount he has individually misappropriated. There were other objections taken by defendant to the award of a technical character. One of these was that the other defendant had not signed the reference. He had, however, attended the reference. The other objections were successfully met by affidavits.

*Held*, that the award should be sustained.

JOHNSTON, E. J., now, (January 6th, 1870), delivered the judgment of the Court:—

This action was commenced as long since as the 5th November, 1863, for the recovery of money charged to have been received by the defendants for the use of the plaintiff. The particulars claim £275 on the 31st December, 1857, with £80 4s. 1d. interest to the date of the writ, and £238 18s. 2d. on the 10th August, 1859, with £59 14s. 7d. interest, and subsequent interest at 6 per cent.

The defendant, *J. G. Tobin*, made default and has since died. The defendant, *T. J. Wallace*, appeared and pleaded. The substance of his pleas are that he never was indebted,—that he satisfied and discharged the claim; that as regarded the sum of £238 18s. 2d., he gave the plaintiff his promissory note in satisfaction, which was not due when the action was commenced. By a plea subsequently added it was alleged that in consideration of the defendant, *Wallace*, agreeing to pay the plaintiff the sum collected by him of the estate of her mother, with 3 per cent. interest, the plaintiff agreed to wait four months for the payment, which had not elapsed at the commencement of the action. And a plea of set-off was also added, the particulars being:—

For professional services in the collection of money for the plaintiff, and commission.....	\$ 100 00
For costs of judgment in <i>McSweeney v. Tobin</i> .....	16 70
Executions.....	3 20
Cash paid at different times.....	90 00
" " <i>Mrs. McSweeney</i> .....	4 00
	<hr/>
	\$ 213 90
" " <i>Wallace v. Tobin</i> .....	783 10
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Judgment in <i>McSweeney v. Tobin</i> .....	816 00
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There is no dispute respecting the origin of the plaintiff's claim. The defendant, *Wallace*, in his affidavit, says "that this action was brought to recover the sum of £513 18s. 2d. principal money, besides certain interest claimed thereon. That the said money had been collected in *England* by the said *James G. Tobin* and me during our co-partnership in business." The particulars only claim \$94 to have been paid, and the proof being deficient, we are left to the plaintiff's admission that £13 15s. paid by *Mr. Wallace* was all she received up to the time of the action. The other credits claimed are disputed, or arose after the suit. Therefore, at the time of the action being brought, unless something had occurred to diminish or discharge the amount the plaintiff's claim against the defendants stood as charged in her particulars, with two deductions, that is to say, £25 from the principal for professional charges, leaving £488 18s. 2d., £13 15s. from the interest for money paid, leaving arrears of interest £126 3s., leaving due on 5th *November*, 1863, principal and interest, \$2460 or £615 1s. 10d. This large debt, thus unquestioned and thus obligatory in its origin and nature, the defendant, *Tobin*, as well by his default as subsequent declarations, recognized as a just demand, which both defendants were bound to pay to the plaintiff. The other defendant, *Wallace*, sought to reduce the demand. As regarded the first sum received of £275, he has stated that he paid it to the plaintiff and her husband, (since dead,) and she and *Mr. Tobin* took it to a bank, and finding it would not be received in her name without her husband, they deposited it in *Mr. Tobin's* name as her Trustee, and that as this was done without consulting him, (*Wallace*,) and was not in the ordinary course of business, he did not hold himself responsible to the plaintiff for the money. It appears, however, from *Wallace's* affidavit, that this money after this came,—by what means is not explained,—to the hands of the two partners, and was used by them for their own several purposes. How much *Wallace* received he does not state. *Tobin* says that of the £275 *Wallace* received £200, and this is corroborated by a memorandum attached to *Wallace's* affidavit, in which, at the head of sums for which he was chargeable, are placed \$800, under date *July*, 1858, being about seven months after the first sum, and a year before the second sum is alleged to have



been drawn from *England*. With such a fact undisputed, the assertion that the deposit in *Mr. Tobin's* name had removed the money from the control of the firm is but idle pretence.

As regards the other sum, *Mr. Wallace* in his affidavit says "that some considerable time after this we collected another sum for plaintiff in *England* of £238 18s. 2d., a portion of which I took and loaned to parties who have never paid, and I fear never will, and the balance was used by *Mr. Tobin* for his own purposes. That I also obtained from *Mr. Tobin* a further sum, and although he owed me at the time as much as I received from him, the money advanced was out of *Mrs. McSweeney's* money. That I also loaned this to the same parties. That in these two sums I received in all the sum of £360, and no more, and the said £360 is all I ever received or appropriated to my own use of the plaintiff's money, and is all I should have been charged with in this suit." This is a bold avowal of dereliction of duty, and the conclusion drawn from it is startling. It is this, that because the partners, without the consent or knowledge of their client, misappropriated her money to their own use in separate sums, *therefore* one of them holds himself absolved from the joint liability for the whole amount which resulted from the collection of her money by the firm. That a doctrine so repulsive to reason and justice and the known principle of law could be propounded by a lawyer would appear incredible had *Mr. Wallace* not advanced it under his oath in reiterated form, and made it the main ground on which, through a series of years, he has resisted the plaintiff's title to recover the whole of the money so justly due to her from both. The next step in this singular transaction follows naturally from such an assumption. The defendant *Wallace* sued the defendant *Tobin* in the name of the plaintiff, *McSweeney*, and *Tobin* having made default, he entered up judgment for about \$800, issued execution, and committed *Mr. Tobin* to gaol. When it is remembered that *Mr. Wallace* was equally a wrong-doer and had a larger amount of their client's money in his hands at the same time, this circumstance is one of recklessness and absurdity in no ordinary degree. *Tobin* had as much right to sue *Wallace* as *Wallace* to sue *Tobin*, and had *Tobin* been less neglectful of his own interests than he appears to have been, he might, by a

plea in abatement of the non-joinder of *Wallace*, have stayed the suit or have driven *Wallace* to the incongruity of seeing himself as co-defendant with his former partner for the recovery of money for which they were jointly liable. The absurdity was completed when the defendant, *Wallace*, in the particulars of his off-set in the present suit, took credit to himself for, and charged the plaintiff with an "amount of judgment in *McSweeney v. Tobin*, \$816."

The use he has made of this judgment in the present action may furnish some clue to his object in this strange procedure. The plaintiff, in her affidavit speaking of it, says: "Afterwards I found that *Mr. Wallace*, in defiance of my express dissent, had brought an action against *Tobin*, and recovered judgment by default, and issued execution in my name, and committed *Mr. Tobin* to prison. I went there to see *Mr. Tobin* and to disavow having had anything to do with his imprisonment. It was there that I learned for the first time of the second amount having been received, and in fact the full particulars of the whole of my affairs with them, and that the first sum, together with the last, had been diverted to their own uses, and utterly regardless of my interests." *Mrs. McSweeney* released *Tobin*, in consequence, as she says, of his having been sued without authority and against her wishes and intentions.

About the same time, but whether before or after *Mr. Tobin's* release I am not aware, there occurred the circumstance which the defendant, *Wallace*, has made the subject of two pleas. He relates it in these words: "That I gave the plaintiff a promissory note or agreement promising to pay her in four months after the date thereof the last sum so collected, with 3 per cent. interest, and although the said note or agreement was not due, this suit was instituted." The plaintiff's version of the affair is this: "*Mr. Wallace* never did deny his liability to me after I had discovered that he had deceived me, but frequently promised me that my money should be paid. On one occasion, after repeated solicitations and as frequent evasions of payment, he offered me a note, a true copy of which I hereunto annex, marked "A." I positively refused to accept this note, and I left the office. He followed me to the street, threw the note at my feet, and said if I did not take that I would get nothing. He then left me and entered his office.

I took up the note and went to the only friend and adviser I had, *Mrs. James Gray*, and she said to keep it, 'You have no vouchers in the world for the money received by them for you, and this note may probably become of service hereafter.' The note is in the following terms:—

HALIFAX, 13th August, 1863.

Four months after date I promise to pay *Mrs. Mary Ann McSweeney*, or order, the amount received of her mother's money in *England*, with three per cent. interest since its receipt.

T. J. WALLACE.

The affidavit of *Mrs. Gray* corroborates *Mrs. McS.*'s statements as far as *Mrs. Gray* is referred to. I cannot think that this transaction improves *Mr. Wallace's* position, even were *Mrs. McSweeney's* statements laid aside. It was then more than five years since the first money, and nearly four since the second amount had been received. She had been kept in ignorance of the disposition of her monies, and had not been paid the interest, while *Mr. Wallace* admits he had been trafficking with funds that belonged to her, and this it is evident he did without her concurrence or knowledge. His client was surely entitled at that period, as regarded both sums, to something more specific in the nature of account, something more substantial in the nature of payment than this piece of paper. How small was his appreciation of the rights of his client and how little his regard for her interest is manifest from the manner in which he, of his own authority, reduced his liability for interest to three per cent., and we look with curiosity to understand the reason he might assign for regulating his client's profits and his own by different standards. He gives his reason in his affidavit in these words: "That I frequently, after the matter was given to *Mr. Morse*, offered to pay all the money I obtained and appropriated to my own use, with three per cent. interest, being as much as I knew the plaintiff would have obtained for it, but it would not be accepted." How he acquired this knowledge that she would make no more of her money he does not explain, but suppose his client preferred to deposit in a bank, where her money would be available at short notice to meet her wants, or to be, if she pleased, afterwards more profitably invested,—what was

that to him,—or how could any future disposition of her property by herself relieve him from the liability he had already incurred by the unauthorized use he had already made of her funds.

The plaintiff, having been driven to this action for the recovery of money so long withheld, was ready for its trial in *April Term, 1865*, but was prevented in consequence of a continuance obtained by the defendant, *Wallace*, on his affidavit of the absence of one *Mahar*, whom he swore to be a material witness, and of whom nothing else appears to have been heard in relation to this suit either before or since. There followed a reference to *B. G. Gray*, a Barrister of this Court, under rule dated 26th *October, 1865*, and his award dated 6th *April, 1866*. In this instrument it is stated that the parties had, while the matter was under discussion before the arbitrator, agreed upon certain terms, in conformity with which, and with the judgment of the arbitrator upon such of the items as had not been agreed upon, and the award was made and the result of which was the payment to the plaintiff of \$1164.03, the parties respectively paying their own costs of suit, and *Wallace* paying the costs of the reference and award. The defendant, *Wallace*, on the 6th day of *February, 1867*, obtained a rule *nisi* for setting aside or reducing the award, which, after argument and reading the affidavits and exhibits on both sides, was, on the 26th day of the same month, discharged by Mr. Justice WILKINS, with costs, from which judgment an appeal was asserted, which was argued before the Court in the present Term, the defendant having intermediately paid in the sum of \$400, which has been taken out as I understand. The agreement on which the award was made appears to me to have been unreasonably favorable to the defendant, *Wallace*. While the plaintiff was credited with the two sums received for her by *Wallace & Tobin*, to which she was by law and in equity clearly entitled, she was only allowed interest at the rate of 3 per cent., although under the facts of the case she was as justly entitled to 6 per cent. as to any other part of her claim. This was no trifling abatement, because part of the plaintiff's money had come to the hands of *Wallace & Tobin* over eight and the remainder over six years previously, and the loss to the plaintiff and gain to the defendant on this abatement,

amounted to little if anything short of £100 or \$400. Then the plaintiff was required to pay her own costs of an action into which she was forced by the unjust, and, I may add, the cruel detention of her money, and yet more, the plaintiff consented to be and was charged as against her demand against the defendants with the amount of two judgments, which, since the commencement of this action, the defendant *Wallace* had recovered against the defendant *Tobin* in relation of subjects unconnected with this suit, together with interest at 6 per cent. from their entry. The judgments, amounting to \$1067.80, and the interest and execution, as nearly as I can make it, to about \$147.49, making together about \$1215, thus giving the full amount for judgments of doubtful value, and allowing on them double the rate of interest which the defendant *Wallace* thought it reasonable to allow for his use of the plaintiff's money.

*Mr. Wallace* was not satisfied, however, the ground of his dissatisfaction being that the plaintiff was allowed the whole of the principal sums received by *Tobin & Wallace* for her, instead of the amount only of her monies which *Wallace* had appropriated to his individual use, being the difference between the whole amount of the plaintiff's monies received by the firm and £300, the sum he was willing to be charged with, and which, as he says, was all he individually appropriated, and the form in which his objection was urged was that the arbitrator had stated the agreement inaccurately. This objection rested on his own affidavit attempted to be supported by rather confused and ambiguous statements of *Mr. Tobin*, the silence of *Mr. John Gray* in an affidavit made on another point in which this was not alluded to, and a note of the arbitrator written after the agreement, in which a certain date was asked for, inconsistently, it was argued, with the arbitrator's affidavit, and which date was not required in view of the agreement he acted upon, but which indeed was as little required in the view taken by *Mr. Wallace*. On the other hand was the affidavit of *Mr. Morse*, who, as the plaintiff's attorney, made the agreement, and which was as emphatic a denial of *Mr. Wallace's* statements as possible, and the recital in the award and the affidavit of the arbitrator in which he stated that he made a memorandum in writing of the terms of

the agreement, which he read to the parties, at the time twice, a precaution taken in consequence of a previous agreement having been the subject of disagreement, and this memorandum he still held, and gave a copy of it. We are clearly of opinion that in face of the facts and evidence before us, there is no ground for accepting as correct *Mr. Wallace's* statement as to the agreement, and that in that particular the award is unimpeachable.

The other objections to the award are more technical. The first taken in the rule I have disposed of; the second that *Tobin* did not sign the rule of reference, if it was necessary for him to have done so, is met by the fact that he joined in the reference, attended before the arbitrator, and in writing filed in Court ratified the reference and concurred in the award. The third, fourth and fifth have been supported by no adequate proof. The sixth, that the arbitrator communicated with *Mr. Morse* without *Wallace's* knowledge or consent, is disposed of by *Mr. Gray*, who has sworn that his only communication with *Mr. Morse* was by *Mr. Wallace's* particular request. The seventh is without weight. The eighth, that the plaintiff, having obtained a judgment against *Tobin*, will have two judgments and be twice paid if the award is enforced, is answered by the fact sworn to by the plaintiff that the judgment was obtained without her authority, and had therefore been discharged by her, and also by the fact, as attested by several affidavits, that this matter had been abandoned at the arbitration, but had it been otherwise, the Court would have hesitated before they allowed a solicitor, by practising on the ignorance of his client, to discharge his own joint liability, by inducing or permitting her to take a separate judgment against his joint delinquent. The ninth, that the arbitrator refused to call another meeting, is disposed of by a contradiction of the assertion that another meeting had been requested. The tenth, that it would be against equity, good faith and law to enforce the award, is but evidence of the perverted notions of justice and the disregard of law which the defendant has manifested throughout.

The grounds of appeal require little further notice. The first and second are general and have been considered. In others the unusual pretences are set up that the defendant

should have been permitted to examine the plaintiff and the persons whose affidavits were adduced in her support before a Judge, Commissioner or jury, and to have taken the question as to the agreement at the reference before a jury. Of these it is unnecessary to say anything they are obviously frivolous. The objection that the opportunity was denied of rebutting the affidavits produced for the plaintiff on the argument on the rule *nisi* is answered by the established practice of the Court. Besides, in this case these affidavits were largely confined to answering and explaining facts alleged in the defendant's affidavits, and beyond this little if anything was required for the opinion I am pronouncing except what the defendant himself declared. There is no ground, under the circumstances, for the complaint that the affidavits of *Mr. Tobin* and *Mr. Gray* should not have been received by the learned Judge. The attempt made to delay or dismiss the argument before us on the ground of the death of the defendant *Tobin*, and the absence of suggestion, and that the plaintiff had withdrawn the money paid into Court, did not succeed at the time, and there does not appear any reason now to attach greater weight to those objections.

I think I have noticed everything necessary for explaining this case, and it is one which, as far as my experience extends, (and it is not a short one,) without a parallel in the Courts of this Province, and as it is the first of the kind, I earnestly trust it may be the last. I do not say this simply because it has its origin in the misappropriation of a client's money by an attorney because such cases, while always calling for severe animadversion, are yet subject to those various modifications of circumstances which more or less may extenuate all the classes of delinquencies and liabilities. I speak of the cause under consideration in view of the aggravations which *Mr. Wallace* has heaped upon it, affecting himself and the administration of justice, and in that light I have felt myself required to detail the circumstances more minutely than would otherwise have been necessary. In doing this, justice to the plaintiff demanded that I should not overlook her statements, but with the exception of one or two points of smaller moment, and of the controversy respecting the award, in which it was necessary to refer to the opposing affidavits, I have tried *Mr. Wallace* upon

his own statements and admitted conduct. What gives this case its great aggravation and impresses on the Court the duty of marking it with severe reprehension is the absence of all moral sensibility and the ignorance, real or affected, of legal responsibility manifested throughout *Mr. Wallace's* course. He speaks of his taking his client's money and loaning it for his own benefit as if it was a thing he had a right to do, and asserts that parties to whom he had loaned it had not paid, and he feared never would, as if he believed that such a fact, if accepted as true, might affect the plaintiff's claim on him. The circumstances that he traded on his client's money through a long course of years, without account or payment of interest, are passed over with the same indifference, and a like insensibility marks his statement of his imprisonment of *Mr. Tobin* for a delinquency of which he was alike guilty, and from which he had not cleared his own skirts, and marks also his account of his unworthy attempt to defraud his client, for it merits no milder term, successful though it was, whose rights it was his duty to protect, by reducing the rate of interest she was entitled to from him, and crowning all is the boldness with which a defence is advanced that outrages all principle, that is to say, that in an action against two attornies who in co-partnership had received money for their client, one of them might reduce the demand to the amount he had individually appropriated and be exonerated from what his co-partner had used. If one could do this the other might, and then the injured client, instead of having a joint remedy, must find out as best he might how the dealings between the partners had stood, that he might apportion their wrong done to himself, and take several judgments for separate amounts against them. In preparing this judgment I have felt at times constrained to pause and ask myself if it was possible that self-interest or self-will could so triumph over reason as to enable any man of ordinary capacity really to credit such a proposition, or whether the whole defence was a great mockery, having no higher end than delay.

The episodes of the judgment against *Tobin* and the note I look upon as obvious aggravations. because from the use made of them in the pleadings and defence, I am led to believe that both were deliberate acts having a formed purpose to aid



the defendant's design of evading his joint liability, and to perplex and embarrass the plaintiff in her efforts to recover her debt from him. On such a defence this suit has been protracted for many years and this poor woman been kept out of money incontestably due to her. She has had to pass through all the wearisome and expensive stages of a lawsuit, at the sittings before the arbitrator, before a Judge at Chambers, before this Court, and yet all she asked was to be paid or to be allowed to enter a judgment against the two defendants, who, in professional confidence, had collected her money. One of these defendants, *Mr. Tobin*, if he erred at first, at least deserves the credit of not having aggravated the first wrong, while the other, *Mr. Wallace*, has left nothing untried that could obstruct the course of justice, and it is not to the credit of the administration of justice in *Nova Scotia* that he has succeeded so far as he has done in delaying and in diminishing her recovery. He has contrived to have near, if not quite £100 struck from her just claim, and to impose upon her the payment of those costs to which she had been subjected by his unwarrantable defence, and he was allowed to pay a large proportion of the debt he was bound to have paid in money by judgments of more than doubtful value at their full amount and with full and undiminished interest.

Before us a side issue was interposed arising from the agreement on the reference, yet the complaint of *Mr. Wallace* was substantially the same. He ought not, he argued, to be held answerable to the extent of the joint liability imposed on him as one of two partners who received and misapplied the plaintiff's money. With a defence resting on a foundation so unsound in law, so corrupt in morals, *Mr. Wallace* addressed us hour after hour in the tones of an injured man, and poured upon the plaintiff's counsel and the arbitrator torrents of invectives as men who had conspired together to wrong him, not only without proof, but without the slightest shade of plausibility or shadow of reasonable suspicion. Indeed, the concessions of interest and costs are but substantial proofs that the plaintiff's claim was not pressed with undue rigor. Nearly four days of the time of the Court, so valuable to the suitors whose counsel have been vainly seeking to have their cases heard, were occupied in this fruitless and discreditable discussion,

and I repeat that if *Mr. Wallace* believed in the assertions he made and was sincere in the complaints he urged with almost clamorous vehemence against being chargeable with the amount awarded, this case is one of unaccountable moral obliquity and mental delusion.

While this judgment is my own, for which my learned brethren are not answerable, our opinions are unanimous that the appeal must be dismissed with costs.




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BAKER ET AL. v. MCFARLANE.

PLAINTIFFS, as Commissioners of Sewers for the District of B. and M., brought action against the defendant for certain dyke rates assessed on the owners of marsh lands in that District for constructing and repairing necessary dykes, &c. Defendant pleaded that plaintiffs were not Commissioners of Sewers for that District. The act regulating the appointment of such Commissioners provided that on being appointed they should be sworn into office by a Justice of the Peace, and that such swearing should be entered in the Commissioners' Book of Record. It appeared that only one of the plaintiffs had fulfilled this requirement, but all three had acted as Commissioners for several years.

*Held*, that in thus directing as to the entry of the swearing, it was not intended by the Legislature to shut out all other proof of qualification, and that there was sufficient evidence aside from this to afford the presumption that the plaintiffs were legally appointed and duly authorized to act in this assessment.

DESBARRES, J., now, (July 19th, 1870,) delivered the judgment of the Court :—

This was an action brought to recover from the defendant \$211.51, which the plaintiffs, by their bill of particulars, claim from him as Commissioners of Sewers for the District of *Barronsfield* and *Minudie*, in the County of *Cumberland*. There are three counts in the plaintiffs' writ and declaration, setting forth the indebtedness of the defendant, 1st, for men, teams, tools and materials employed and provided by plaintiffs as such Commissioners for building and repairing dykes for the protection and security of marsh lands in said District, of which the defendant was one of the owners; 2nd, for dyke rates legally assessed on the owners and occupiers of marsh lands, of which defendant was one, in said District, for constructing and repairing dykes necessary to prevent the inundation of, and securing the said marsh from the sea; 3rd, the common count for work and labor and materials provided,

&c. The defendant, by his plea to the first count, says that the plaintiffs are not and never were Commissioners of Sewers for the District of *Barronsfield* and *Minudie*. Secondly, that they are not and never were legally appointed Commissioners for said District. Thirdly, that defendant is not and never was owner of marsh land in said District. Fourthly, that plaintiffs, as such Commissioners, never required the defendant to furnish men, teams, &c., for the constructing and repairing dykes for the protection and security of marsh land in the said District of *Barronsfield* and *Minudie*. Fifthly, that defendant is not and never was indebted to the plaintiffs as such Commissioners of Sewers for men, teams, &c., employed and provided by plaintiffs for constructing and repairing dykes. Sixthly, for a plea to the second count, that defendant is not and never was indebted to the plaintiffs for dyke rates *legally assessed* on the owners and occupiers of marsh land in the said District for the purpose of constructing and repairing dykes necessary to prevent the inundation of and secure the said marsh from the sea. Seventhly, that defendant is not and never was an owner and occupier of said marsh. Eighthly, that the *dyke rates never were legally assessed*. Ninth, to the common count, never indebted.

The plaintiffs joined issue on the first, second, fifth, sixth, eighth and ninth pleas, and replied to the third and seventh pleas that the defendant is an owner of marsh land in said District in right of his wife, *Ann McFarlane*, who is living. And for a second replication that defendant is an occupier of marsh land in said district. And for a replication to defendant's fourth plea, that defendant does not reside within ten miles of the place where the labor in the declaration mentioned was required to be done and materials furnished.

The case was tried before Mr. Justice WILKINS, in *June* Term, 1869, at *Amherst*, when a verdict, on the recommendation of the learned Judge, was found for the plaintiffs by consent, subject to the opinion of the whole Court, with power to order judgment to be entered for the plaintiffs or defendant, or direct a nonsuit to be entered, according to their view of the law and facts of the case. It was argued before us at the last Term, and allowed to remain over that we might have time to look into and form our judgment upon it. I have since then care-

fully read and considered the evidence produced on the trial, to see whether it is sufficient to sustain the verdict taken for the plaintiffs upon the material issues raised by the pleadings to which I have referred. The plaintiffs, as public officers, appear to have incurred an expense in protecting valuable marsh land from inundation of the sea by means of dykes, and if they have acted at the request of the proprietors and within the scope of their authority, the act by which their proceedings are to be governed has provided an ample remedy against all persons liable to contribute to and bear a just and rateable share of the expense. We must in the first place inquire whether the plaintiffs are, what they profess to be, Commissioners of Sewers for the District for which they acted, as that is denied by the defendant, and in order to facilitate that inquiry, I will refer to chapter 72, *Revised Statutes*, (3rd Series,) now the law regulating the appointment of Commissioners of Sewers, which has existed, with slight variations, from 1760 to the present day. By section 2 of that chapter "the Governor-in-Council, at the request of any of the proprietors of any marsh, swamp, or meadow land may appoint one or more Commissioners of Sewers for the County, Township, or place where such lands lie, *who shall be sworn into office* by a Justice of the Peace, and such swearing shall be entered in the Commissioners' Book of Record, which shall be evidence of the fact, and the Commissioners shall appoint a Clerk, who shall be sworn into office by any of the Commissioners, &c." It is clear, then, that no person appointed a Commissioner of Sewers can, according to this section, legally discharge the duties of his office without taking the usual oath of office before a Justice of the Peace. That is made imperative, and an entry of it ought of right to be made in the Commissioners' Book of Record by the Clerk. The Commissioners' Book of Record was produced in evidence on the trial, but there is no entry or minute in it of either of the plaintiffs having been sworn into office with the exception of *Charles Baker*, as to whom there is an entry that he personally appeared before *William Baker, J. P.*, on the 20th May, 1867, and made oath that on the receipt of his commission in 1848 or 1849 he was duly sworn into office and qualified as a Commissioner of Sewers for *Minudie, Barronsfield and River Herbert* marshes, before *Joseph Read*, one of the Justices of the Peace for the County of *Cumberland*.

This entry by the Clerk in the Commissioners' Book of Record must, I think, be considered as sufficient evidence of *Charles Baker's* qualification, but a question was raised whether the other two plaintiffs, who, in conjunction with him, performed the work for which they now jointly seek to make the defendant responsible, were, in the absence of the required entry in the Commissioners' Book of Record, qualified to act in the capacity of Commissioners of Sewers. In directing that the swearing into office should be entered in the Commissioners' Book and that such entry should be evidence of that fact, I do not think it was contemplated or intended by the Legislature to shut out, or that the words of the section can be construed as shutting out all other proof of qualification, for if such had been the intent, it would assuredly have been so expressed. The testimony of *George Hibbard*, one of the plaintiffs, who was examined as a witness on the trial is, it appears to me, sufficient to satisfy the requirement of the second section of chapter 72 in this respect. He states that he was a Commissioner of Sewers for *Minudie*, and first acted in 1861, and acted as such during the last three years. That the other two plaintiffs were also Commissioners and acted as such, (*Charles Baker* for twenty years.) That the witness acted by virtue of a commission, and they all acted as Commissioners of Sewers for *Minudie* and what is now called *Barronsfield*, which is part of *Minudie*. The facts of all the plaintiffs having acted as Commissioners of Sewers for several years was *prima facie* evidence of their legal appointment and qualification to act in that capacity, for all public officers acting in the discharge of their duties, as the plaintiffs in this case were, are presumed to be duly appointed and authorized to act. We may therefore assume from the evidence before us that the plaintiffs were legally qualified to act as Commissioners of Sewers for the District within which the work was performed.

It was, however, objected at the argument that, assuming the plaintiffs to have been duly appointed and qualified to act as Commissioners of Sewers, they were not entitled to recover, because they had not, nor had either of them, been legally selected to perform the work sued for. This objection was made under the 3rd section of chapter 72, which is in the following words: "Two-thirds in interest of the proprietors of

any marsh, swamp or meadow lands within the jurisdiction of such Commissioners *may, by themselves or their agents*, select one or more Commissioners to carry on any work for reclaiming such lands, and they may, at any time, add to or diminish the number of Commissioners selected, or supercede any or all of them and choose others instead, and the choice or dismissal for or from the management of any particular land *shall be made in writing* under the hands of two-thirds of the proprietors in interest in such lands, and shall be entered in the Book of Records or filed by the Clerk." No evidence was produced on the trial to shew that the plaintiffs or either of them had been chosen by two-thirds in interest of the proprietors to construct and repair the dyke of the *Barronsfield* marsh, but it appears from an entry in the Commissioners' Book of Record which was received in evidence, that at a meeting held pursuant to notice at *Minudie*, by the proprietors of the *Minudie* Marsh, on the 5th of *August*, 1867, to take into consideration the repairs of the dyke destroyed by a storm which had occurred two days before, it was unanimously resolved to repair the Big Marsh Dyke as speedily as possible and to empower *the Dyke Sewers* to repair it or make a new one in place of the old, as they might think most beneficial. It was also resolved and decided upon at that same meeting "that the proprietors of the *Barronsfield* Marsh should proceed and mark out for the Sewers any alterations that might be necessary to be made." The inference to be drawn from this resolution is that the proprietors of this marsh either had employed or intended to employ the Commissioners of Sewers to perform work, otherwise it would have been quite unnecessary to mark out the alterations for them.

By another entry in this book it appears that the proprietors of the *Minudie* marshes met on the 10th *September*, 1867, pursuant to notice given by the order of the Commissioners of Sewers, and at that meeting an estimate was submitted of the probable expense of the Big Marsh up to that time, and at the same meeting three persons were appointed a Committee to select a site on the *Barronsfield* Marsh whereon to place a portion of the dyke which was intended to be re-built. The Commissioners having subsequently entered upon and completed the work, I can come to no other conclusion than that it was done at the

request and with the sanction of the proprietors. It must have been done with their knowledge, and if they did not desire it to be proceeded with, they ought, in common fairness, to have notified the Commissioners to desist. They did not require them to desist, and now that the great object of protecting the marsh from the inundation of the sea has been accomplished, I think it cannot well be said that it was an unauthorized operation for which the plaintiffs are not entitled to be paid. Section 8 provides that where any rate shall exceed \$1.50 an acre on the whole quantity of rateable land, *the Commissioners shall summon the owners* or occupiers of such land or their known agents, or such of them as shall reside within ten miles of the work, to meet at a certain place, &c., when two-thirds in interest of the owners or occupiers present may elect not less than three or more than five disinterested persons as assessors, who shall be sworn into office the same as the Clerk, and they, or a majority of them, *shall with the Commissioners assess the owners* or occupiers for the expenses incurred.

There is a minute in the Commissioners Book of Records dated 1st *February*, 1868, of the appointment of three persons to assess, in conjunction with the Commissioners of Sewers, the expenses of the Barronsfield Marsh and Home Marsh, and there is a certificate dated the 7th *February*, 1868, signed by *George Hibbard*, one of the plaintiffs in this suit, to the effect that the three assessors were duly sworn to the faithful discharge of their duties as such assessors, and the assessment produced in evidence of the same date as the certificate is signed by them, together with the Commissioners, as joint assessors. Everything in relation to the appointment and swearing in of the assessors, as well as the making of the assessment appears to have been done in conformity to the requirement of this section of the act, and therefore the assessment is of itself unexceptionable to prove the affirmative of the issue raised on defendant's third plea, by which he denies that he ever was owner of marsh land in the district of Barronsfield. The following evidence was adduced: *Rufus Seaman*, a witness called on the part of the plaintiff, says: "I am interested in a small portion of the Barronsfield marsh. My father, who died in *September*, '64, owned the whole of it. After my father's death *defendant occupied a*

*portion of that marsh. Clarke was his tenant. McFarlane received rent from him; he claimed to own a portion of it. I was co-executor of my father's will with McFarlane from November, 1864. It may have been the following May that McFarlane took possession of this portion under his management. I have not, as executor or otherwise, interfered with it since. Clarke was in possession of the marsh before my father's death as tenant. No rent has been paid by him to me since. Stephen Clarke says: "I occupy a farm at Minudie in Barronsfield. I rented under the late Mr. Seaman, by lease dated 30th January, 1864, for five years from 1st May, 1864, and have paid taxes and dyke rates. I made no other arrangement than of the lease until May last. I told Seaman I had no right to pay and that my landlord ought to pay it. I meant McFarlane. I consider it a portion of his property. I settled up with Seaman's executors and McFarlane told me I was his tenant and I paid him rent."*

This evidence was enough to justify the assessors in assessing the defendant for that part of the marsh which he claimed, and whether the work was performed by the plaintiff with or without the consent of the defendant, there can be no doubt that all the other proprietors sanctioned the expenditure, and, having done that, I think the defendant is bound to pay his rateable portion of it. Looking at the whole of the evidence, I am of opinion that the plaintiffs are entitled to retain the verdict which the jury found against the defendant, and that judgment must be entered thereupon for the plaintiffs with costs.

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### LINDSAY v. ZWICKER.

PLAINTIFF gave his note for the deposit required on a purchase at auction, but subsequently refused to carry out the contract, and sought to recover the amount of his note.

*Held*, on the authority of *Black v. Gerner* and *Gray v. Whitman*, Thomson's Reps., 157, that he could not recover.

JOHNSTON, E. J., now, (July 19th, 1870,) delivered the judgment of the Court:—

This case was tried at *Lunenburg*. The learned Judge inclined to the opinion that the plaintiff's case had failed, but



eventually it was agreed that a verdict should be taken for the plaintiff, subject to the opinion of the Court on the law, and that according to that opinion judgment should be entered for the plaintiff's demand or of nonsuit or for the defendant. The action was brought to recover the amount of a promissory note which had been given for the deposit on a sale at auction, the defendant thereunder having immediately after refused to complete the contract, and no change having taken place in the possession. It was admitted that the requirements of the *Statute of Frauds* had not been complied with, but the plaintiff's counsel contended that, although the contract could not be enforced, yet, because a note had been given, the deposit might be regained. The case was twice argued,—the second time to enable the counsel to elucidate more clearly the distinction which was relied on, arising from the giving of a promissory note. We do not think that much new light has been thrown on the question or that the argument has been materially varied.

The cases of *Black v. Gesner et al.* and *Gray v. Whitman*, decided in this Court many years ago, (*Thomson's Reps.*, 157,) are directly in point, and (if law) are conclusively against the point of the plaintiff's counsel. We feel bound by these decisions unless it can be shewn that they were unsound in principle by cases manifestly applicable and of irresistible weight. No such case has been, we think, produced. The strongest, *Jones v. Jones, C. M. & R.*, 88, is materially variant in this,—that the vendee went into and was in possession—it is true some of the Judges used language that went beyond this distinction, yet it is clear that the fact of the possession was in their minds, and it forms a distinction so manifestly material as to prevent the application of that case to the present with the conclusive effect necessary to overrule the present decisions of our own Court. The argument for the plaintiff is not without weight nor the point without difficulty, but not sufficient, we think, to overbear the reasoning and the authorities the other way.

We are of opinion that there must be judgment of nonsuit for the defendant with costs of the arguments.

## DEWAR v. PEARDON.

When a verdict is sought to be set aside solely on the ground of its being against the weight of evidence, this Court will seldom disturb it, unless the weight of evidence largely preponderates against it.

DODD, J., now, (July 19th, 1870,) delivered the judgment of the Court :—

This is an action for goods sold and delivered. Pleas : never indebted, payment and set-off. Trial before WILKINS, J., at *Amherst*, in *June*, 1869. Verdict for defendant and rule granted to set aside as against law and evidence. The argument in support of the rule was altogether conducted upon the grounds that the weight of evidence was against the verdict. For many years past this Court has followed the principles found to govern cases like the present in the Courts in *England*, and seldom disturb the verdict, unless the weight of evidence largely preponderates against it. The only cases cited at the argument on either side were the decisions of this Court, which may hereafter be referred to. Cases may arise where the verdict is so perverse and so much at variance with the evidence that great injustice would arise if this Court did not exercise its legitimate functions and set such verdict aside ; but in the language of *Tyndal*, C. J., in *Mellin v. Taylor*, 3 Bing., N. S., 109, the Court in such cases ought to exercise not merely a cautious, but a strict and sure judgment, before they leave the cause to a second jury. The question here is a question of fact, and was properly submitted by the learned Judge who tried the cause to the jury whose province it was to decide upon the credit of the witnesses, and having found for the defendant, our inquiry now must be was there any evidence to justify such finding. This largely depends upon the order of the 28th *September*, 1867, upon the defendant for a load of coal, if signed by the plaintiff or by his authority, then in either case the verdict is correct.

The evidence is certainly conflicting. That of the plaintiff I think the jury might have rejected upon the ground that either his memory was so defective as not to be depended upon or that he was wilfully inaccurate in his statement of facts,

and if his evidence is withdrawn from the case then the weight of evidence appears to me to be with the defendant, or certainly as strong in his favor as in that of the plaintiff, which is all that is required to sustain the verdict. Upon the 2nd *July*, 1868, the plaintiff made an affidavit, shewing the defendant was indebted to him in the sum of \$200, and for which sum the defendant was arrested in the present suit. Upon the previous 20th *February* he wrote to defendant, enclosing his account, claiming a balance of \$78.20, at which time the dealings between the parties were closed, and yet subsequently and without much regard to his oath, he made the affidavit claiming a debt of \$200.

The defendant states that in 1860 the plaintiff introduced *Bent* to him, at Prince Edward Island, as his friend and agent, and said whatever I did with him would be the same as with himself. This the plaintiff does not in express terms deny, but says he has no recollection of the introduction, thus leaving the defendant without a contradiction throughout the evidence. *Bent* says he is positive he had the authority of the plaintiff for signing his name to the order upon the defendant, while the plaintiff, on the other hand, is equally positive he did not give the authority, and he further states he allowed no man to write a document for him without his name being subscribed to it, and I presume he means by himself. In a subsequent part of his testimony, when the order upon *Pope*, of the 12th *September*, 1868, drawn by *Peardon* in his favor, was shewn to him endorsed in his name, he then admitted it was signed by *Bent* with his special authority. This order was drawn but fourteen days before that upon the defendant for the coal. Taking his evidence altogether, I cannot avoid thinking there was much for the jury in it to discredit, and if they did so then we have the contradiction between *Bent* and *Landers* to its form. The latter states *Bent* admitted to him that he had signed the order without the authority of the plaintiff. This *Bent* denies. *Lander* is the brother-in-law of plaintiff, and not on terms with *Bent*, making it purely a question of credit for the jury as to which of these witnesses they believed. The Judge who tried the cause left it to the jury very open upon the credit of all the witnesses, and in doing so we think he was correct, and as they found for the defendant, we are of

opinion the weight of evidence is not sufficiently preponderating in favor of the plaintiff to justify us in disturbing the verdict. The rule, therefore, for a new trial, must be discharged with costs.

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### SILVER ET AL. v. McCULLOCH.

APPEAL from an order discharging an order *nisi* to set aside an award made in favor of plaintiff. The award proceeded mainly on evidence taken under a commission executed in England, but this did not appear from the award itself, nor did it contain the grounds of the arbitrator's decision. This commission and the evidence taken thereunder had been returned to the Prothonotary and opened by him in the presence of the plaintiff's counsel alone, without any notice given to the defendant's counsel, then handed to the plaintiff's counsel, and by him produced to the arbitrator, and under protest of defendant's counsel read to and considered by the arbitrator. But with the exception of this objection the defendant's counsel, although a period of eighteen months had elapsed since the award, had taken no steps to object to the mode in which the evidence under the commission was taken, or to the legal character of that evidence, nor was any such pointed out at the argument. The arbitrator, however, had promised to consider any authorities which defendant's counsel might present to him on this subject, and had made the award without having a further hearing.

*Held*, that the application was made too late.

Appeal dismissed with costs.

WILKINS, J., now, (July 19th, 1870,) delivered the judgment of the Court :—

On the 25th of *March*, 1869, Mr. Justice DESBARRES made an order discharging an order *nisi* which had been obtained by the defendant at Chambers to set aside an award made in this cause, and on the 7th of *April* following the same learned Judge ordered that the defendant should have leave to appeal to the full Court from the first mentioned order. The appeal was granted on eleven grounds, stated in the order allowing the appeal. The order *nisi* so discharged was made on reading the affidavits of *Robert Motton* and *Robert L. Weatherbe*, and the rule of reference, the award, and the papers on file in the cause. The award, on reference to that learned gentleman of the cause and all matters of dispute therein, was made by *Hiram Blanchard*, a Barrister of this Court. He found all the issues joined in favor of the plaintiffs, and that the defendant was at the commencement of the action indebted to the plaintiff in \$1113.56. His award is dated the 30th *January*, 1869.

It appears, (not on the award, but from the affidavit of the plaintiffs' attorneys,) that the award proceeded partly on the evidence of *Mr. Foster* and partly on evidence taken under a commission executed in *England*. The award itself does not disclose the evidence on which it is founded nor the views of the learned arbitrator's decision. It appears from the affidavits that defendant, according to the testimony of *Mr. Foster*, admitted before the arbitrator the plaintiffs' account as stated in their particulars, with this qualification, namely, that some of the goods the subject of the action had not reached his hands, and these of the value of £70 or £74. Extracting from the numerous objections urged against the order appealed from the substantial ones, it appears that they refer partly to the evidence submitted to the learned arbitrator under the commission, and partly to surprise on the defendant, in consequence of an alleged unredeemed pledge given by the learned arbitrator to consider certain authorities that were to be furnished by the defendant's counsel before the award should be made. Respecting the first of these, it does not appear when the commission was returned to the Prothonotary at *Halifax*, but it was opened by that officer in the presence of the plaintiffs' attorney alone, and without any notice of the return of the commission and the examinations to the defendant or his attorney being given to him by the plaintiffs' attorney. A few days previous to the first hearing of the cause by the arbitrator, the plaintiffs' attorney, without the consent or privity of the defendant's attorney, received the commission and examinations from the officer of the Court, together with the other papers on file in the cause. He, at a hearing before the arbitrator on the 14th of *January*, of which he had previously notified the defendant's attorney, and after he had waited a few minutes for the latter, produced the commission and began to read it. The defendant's attorney then made his appearance and objected to the commission being read on the ground of want of notice. The hearing was adjourned until the 16th proximo, when both the attorneys appeared. Then the reception of the commission was again objected to, but received by the arbitrator, who heard the same and the examinations read, the defendant's attorney and counsel objecting thereto. The foregoing facts are stated by *Mr. Foster*

in his affidavit with others to which I shall have occasion to refer presently. *Mr. Motton*, the defendant's attorney, states that, presenting himself before the arbitrator a few minutes before the appointed time, he found the plaintiffs attorney reading to the arbitrator the commission of which he had had no previous notice, and which he then saw for the first time, and that he immediately objected to its reception as evidence on those grounds, referring to the requirements of the statute, which had not been complied with. He adds that he stated to the arbitrator that if the objections urged by *Mr. Weatherbe* to the reception of the commission could be brought before this Court, the defendant would rest his defence on them, and that the learned arbitrator thereupon observed that that was a point on which the defendant had a right to have the opinion of the Court, and further that if it be proper or advisable, he would, in his award, set out the objection referred to rather than report it up under the statute. *Mr. Motton* further states that *Mr. Blanchard* agreed to have another hearing or receive authorities on the part of the defendant to shew it would be permissible to set out the grounds of his award on the face of it, and further that if he could not give the defendant the advantage of the objections he would not shut him out altogether, but give another hearing.

The only further facts not noticed above stated by *Mr. Weatherbe* in his affidavit are to the effect that he objected to the reception of the evidence under the commission on the ground of want of notice under the statute; that he took and urged the objection at his first appearance as defendant's counsel before the arbitrator; that after hearing it the arbitration adjourned, agreeing that he would consider whether the evidence should be admitted at all on the preliminary ground of objection, and that if he was not bound to reject it on these grounds he would consider whether he would allow the objections, if any, appearing on the face of the commission, to be raised before him. *Mr. Weatherbe* proceeds to state that at the next meeting the arbitrator overruled the objection as to want of notice, and referring to section 10 of chapter 133, declared he would hear no objections whatever respecting the commission. *Mr. Weatherbe* and *Mr. Motton* concur in stating that they would not have consented to waive the right of

calling the defendant if the arbitrator had not distinctly admitted that the defendant had a right to have the objections referred to heard by the Court. *Mr. Weatherbe* further states that there was no further hearing, nor had he notice of any, and he says intelligence of an award made took him entirely by surprise. He concludes by stating that once after the last hearing the learned arbitrator informed him that he had found no authority for setting out the grounds of his award, and that he, (*Mr. Weatherbe*,) then communicated to him a promise to produce authority to shew that the award might contain the grounds on which it was made.\*

*Mr. Foster* admits that the learned arbitrator expressed his opinion that objections to the commission should be made before a Judge and not before him. He also admits that *Mr. Weatherbe* requested the arbitrator to make his award in the shape of a report, or to set out the objections raised, and that on the arbitrator's expressing doubts as to his power to do so, *Mr. Weatherbe* undertook to produce authorities for such a course, and that the learned arbitrator expressed his willingness to give those authorities, when received, due consideration. *Mr. Foster* says that, while he did not understand *Mr. Blanchard* to promise another hearing, yet the learned arbitrator said in substance, as near as he could recollect, that if, on looking at the authorities, (which it was understood *Mr. Weatherbe* was to furnish,) he could not find sufficient authority for making the award, as defendant's counsel wished, he would inform them before making up his award, and he adds these words, viz.: "Whatever the exact words used by *Mr. Blanchard* were, they at the time conveyed the impression to my mind that *Mr. Weatherbe* and *Mr. Motton* were simply to be allowed to furnish what authorities they could, and that the arbitrator would let them know before finally making up his award as to the result of his examination of the authorities."

These are all the material facts furnished by the affidavits. The learned Judge whose order is appealed having previously distinctly apprized the defendant's counsel as well as the

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\*The time of this conversation *Mr. Weatherbe* refers to is the 26th January, which was four days before the award bears date. The last meeting before the arbitrator appears to have taken place on the 22nd of that month.

counsel of the plaintiffs of his intention to inform his mind by that means of doubts left upon it by the affidavits, required an affidavit from the learned arbitrator. It merely stated that of which this Court, from its knowledge of the learned arbitrator, could need no assurance, that that learned gentleman heard all the testimony and all the objections and arguments of the counsel on both sides until he understood that both parties had concluded. He says that he did not intend the counsel to understand or expect another hearing after the last which he gave. He, however, states his distinct recollection that it was agreed at the close of the last hearing before him that *Mr. Weatherbe* should furnish him with authorities, but that he heard nothing of a further formal meeting, nor of any desire or intention on the part of defendant's counsel to produce the defendant or any other witnesses. The undisputed facts of the cases before us, as they appear from the affidavits, are as follows :—The award discloses no views of the law governing the mind of the learned arbitrator, nor the nature of the evidence before him. It is admitted, however, by the parties that, (with the exception of the officer of the Court, who testified merely of the integrity of the documents in question,) the only living witness was *Mr. Foster*, the plaintiffs' attorney, whose testimony that gentleman has made us acquainted with, and the only written testimony consisted of certain examinations purporting to be taken under a commission sued out by the plaintiffs, issued out of this Court and directed to commissioners in *England*, which, together with the examinations, was returned to the Prothonotary of our Court, and by him in the presence of the plaintiffs' counsel alone opened without any notice of the return of the documents or otherwise given to the defendant's attorney, handed over to the plaintiffs' attorney, and by that attorney produced to the arbitrator, and under protest of defendant's counsel and attorney read to and considered by the learned arbitrator. The affidavit of the learned arbitrator, made by him, as it recites, at the request of the plaintiffs' counsel and of the learned Judge, while it denies all statements to the effect that a meeting ulterior to the last hearing was promised, intended, or reasonably understood, does nevertheless important corroboration to allegations made by the defendant's own counsel, and entirely, indeed, confirmed



by the plaintiffs' attorney, that at the close of the last hearing it was agreed that *Mr. Weatherbe* should furnish the learned arbitrator with authorities. We know *aliunde* from what is before us what purpose those authorities were designed to serve, viz., to satisfy the mind of the learned arbitrator whether it would comport with precedents and his duty to state in his award the grounds of it, especially in relation to the evidence under the commission, in order that if the examinations had been irregularly opened, or if they were subject to any inherent legal objections, the defendant, notwithstanding the award against him, should have the benefit of the objections in question.

We cannot shut our eyes, and no authority cited requires us to shut our eyes to the fact disclosed by the plaintiffs' attorney that the examinations were a portion of the testimony before the learned arbitrator, and we know not how far they may have influenced his conclusions. This evidence was formally objected to at its production by the counsel for the defendant. Had the matter rested there, and had the arbitrator credited the objection, and, without any condition or pledge respecting it given to the objecting counsel, treated it as legal evidence and acted on it, we might have been so pressed by the authorities as to decide that the award could not on that ground be opened up. *Archer v. Owen*, 9 Dowl., 341. But the matter does not rest there, seeing that, to adopt the very words of the plaintiffs' counsel, who seeks to sustain the award, "*Mr. Blanchard* said in substance that if, on looking at the authorities, (which it was understood *Mr. Weatherbe* was to furnish,) he could not find sufficient authority for making the award, as defendant's counsel wished, he would inform them before making up his award, and whatever were the exact words used by *Mr. Blanchard* at the time, they conveyed the impression to his (*Mr. Foster's*) mind that *Mr. Weatherbe* and *Mr. Motton* were simply to be allowed to furnish what authorities they could, and that the arbitrator would let them know before finally making up his award as to the result of his examinations of the authorities." *Hutchinson v. Shepperton*, 13 Q. B., 955; *Pepper v. Gorham*, 4 Moore, 148; *Jones v. Correy et al.*, 5 Bing. N. C., 187. The pledge thus given, probably because the learned arbitrator naturally inferred

from his not receiving a note of the promised authorities during the interval of a week that elapsed between the last hearing and the award made, that the defendant's counsel did not intend to submit it, does not appear to have been, in fact, redeemed, and we should have thought if the question had been presented to us within the statutable period prescribed for objecting from opening the commission, or rather from knowledge by defendant's counsel of its being opened, that inasmuch as it was then doubtful whether the evidence taken under the commission could be legally read, the award ought not to be confirmed. But now, when nearly eighteen months have elapsed since the award was made, and no steps have been taken, (as we have ascertained,) by the defendant to object to the mode in which the evidence under the commission was taken, while no objections have been made to us as respects the legal character of that evidence, though during the whole of that long period he had full opportunity of pointing out and urging such objections, if they exist, the question before us must be viewed in a very different aspect. As no objections have been stated on the points just noticed the award is clearly unimpeachable, and it must be borne in mind that our *Revised Statute* limits the right of a party who may be affected by the reading of such evidence, to object to its being read, to a period of eight days after the notice of the return of the examination of the witnesses residing abroad, during which period the objections are required to be specified in writing and to be submitted to the Court or a Judge to be decided on. Such a course, as already observed, has not, up to this time, been pursued by the defendant.

We are therefore of opinion, (the evidence in question not having shewn to be, when this appeal was allowed, subject to any objection,) that we are bound to consider that sufficient evidence was before the learned arbitrator to sustain the award, and that therefore this appeal from the order of the learned Judge who made it must be dismissed with costs.

WILKINS, J., orally added words substantially as follows, viz.:—"The case is in substance this. The defendant, who, for a long time before he moved to set the award aside, knew of and had free access to the opened commission and the

evidence taken under it, and had then and ever since has had the means of ascertaining whether any valid objections existed in relation to them, did not, when he so first moved, point out, nor has he since pointed out any one such objection. For what end of substantial justice, then, should we in effect send back this matter to the learned arbitrator, who was as respects it a Judge of law and fact selected and approved by the defendant himself, even on an assumption no doubt well founded,—that the award rests on the evidence disclosed by the commission ?”

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### CAMPBELL v. HALLIBURTON ET AL.

On the trial a motion was made for non-suit. The Judge inclined to the opinion that plaintiff had failed to establish his case, but not so decidedly as to grant the motion, and it was agreed to withdraw the cause from the jury and refer it to the Court. The evidence was very indistinct, and as, in view of the pleadings and circumstances, a judgment could not be given for either party,

*Held*, that there should be a new trial.

JOHNSTON, E. J., now, (July 19th, 1870,) delivered the judgment of the Court :—

This cause was tried at *Baddeck*, and, as appears by the minutes of the learned Judge, after the plaintiff's case was closed, and before evidence had been given for the defendants, on a motion for nonsuit, the learned Judge inclined to the opinion that the plaintiff had failed to establish his case, but not so decidedly as to induce him to grant the motion ; and under these circumstances it was agreed to withdraw the cause from the jury and refer it to the judgment of the whole Court. In consequence, the opinion of the jury was not taken on issues in writing, agreed upon by the counsel, nor on the pleadings, nor were damages assessed. The plaintiff's writ set out a deed by which *John and Malcolm Campbell* assigned to the defendants their real and personal estate to be converted into money and applied in paying certain creditors named in an annexed schedule, who, within a specified time, should execute a release to the assignees ; that the plaintiff, one of these creditors, did release within the period, and the defendants accepted the

trust and acted, and paid the plaintiff part of his debt. But although the property was more than sufficient, yet the defendants did not take possession of it and convert it into money and pay the plaintiff in full. The only pleas bearing on the question apparently in dispute alleged that £50 was all that was due the plaintiff, and that he put that sum in the schedule as the amount due him, and which had been paid him, and as an equitable defence that the plaintiff, the assignors and the defendants agreed that the plaintiff should accept the said *John Campbell* as his payment and the defendants be discharged from liability as assignors, and that the plaintiff accepted and received certain sums in payment of the amount due him.

From the course the trial took, no evidence was given on the pleas, nor was it shewn what was the nature and value of the property, or into whose possession it came, or whether the defendants ever received any part of its proceeds, or that any demand had been made on them. The plaintiff's claim is for damages for neglect of duty in not realizing the proceeds of the property, not for non-payment of money received, and these damages it is the province of the jury to assess after evidence of all the circumstances, and in the absence of such finding it would be difficult to give judgment for the plaintiff for any specific amount. The defendants, not having executed the deed, are chargeable on the ground of acceptance, and the evidence is not very distinct on this head, and it appears to the Court that, in view of the pleadings and circumstances, the case does not come before it in such a manner as to warrant a judgment being now given. We are therefore of opinion that there should be a new trial, and that the parties respectively have leave to amend or add to their pleadings, without costs if they see fit, and that the costs of this argument abide the first result.

## HUNTER v. RONNE.

PLAINTIFF and defendant were adjoining proprietors, their respective lots being divided by an ordinary post and board fence. This fence was blown down, and defendant employed persons to build a new one, which differed from the old in that the posts had "shoes." The excavations necessary for the posts and "shoes" were made by defendant partly on his own land and partly on plaintiff's land.

*Held*, that defendant had no right to excavate or build upon the plaintiff's land.

DESBARRES, J., now. (July 19th, 1870,) delivered the judgment of the Court :—

The plaintiff and defendant are owners of adjoining lots of land in this city, divided by a post and board fence, which for several years has been upheld and recognized by both parties as the true line of division of their respective lots. In 1867, the fence being old and decayed, was blown down by the wind, and the defendant employed persons to remove the materials and build a new fence in place of and in the line of the old. The posts of the old fence stood on the south or defendant's side of the fence, the posts of the new were sunk in the ground on the north or plaintiff's side of the fence, thus encroaching on plaintiff's lot four or five inches, the depth of the posts. This encroachment on the plaintiff's lot is one of the acts of trespass complained of in the present action. Secondly, the plaintiff complains that in making the new fence the defendant not only made the holes for the posts wholly on plaintiff's lot, but also dug holes therein and made excavations for the shoes affixed thereto, extending further on plaintiff's lot than the posts, instead of digging the holes for and placing both on his own land or side of the fence, as he insists it was the duty of the defendant to do. Thirdly, that defendant cut and destroyed some of the roots of and overturned a hawthorn tree belonging to the plaintiff situate inside of his lot, by which he says the tree was materially injured.

The defendant, first denying the committing of the several trespasses set forth in the plaintiff's writ and declaration, by his third plea justifies the digging of the holes, and asserts a right to dig the holes on plaintiff's land in extension of those made on his own land for the purpose of erecting and supporting the new fence in place of the old, and this raises a question of some importance, that is, whether, under the law as it exists,

an owner of land adjoining the land of another may, in making a line or partition fence or ditch, make excavations, &c., partly on his own land and partly on the land of an adjoining owner. His Lordship the Chief Justice, before whom this cause was tried, acting on the authority of the case of *Vowles v. Miller*, 3 Taunt., 137, in which the principle prevailing at common law is laid down, instructed the jury that the defendant was bound to keep within the line of his own land, and was in strict law guilty of a trespass if he transgressed it. Under these instructions the jury found a verdict for the plaintiff, and the defendant's counsel being dissatisfied with the ruling of the learned Chief Justice, took a rule under the statute to set it aside, contending that the defendant had a right in erecting the new fence to dig holes for the posts and the shoes affixed thereto equally as much on the plaintiff's land as on his own, in other words contending that the rule of the common law in relation to partition fences if not expressly, had virtually been superceded by the provisions of chapter 48 of the *Revised Statutes*, (3rd Series). This contention, however equitable it may seem to be, cannot, I think, be supported, for there is nothing in this act to alter or affect in any way the common law principle applicable to the making of such fences. One of the objects of the Legislature in passing this act, as I read it, was to designate the nature and kind of materials of which all fences of enclosed lands are to be constructed, another to prescribe the height of such fences, and the proportion of fences to be built and maintained by the respective proprietors of adjoining and improved lands, giving the fence viewers in case of any neglect on the part of any adjoining proprietor to erect his proportion of fence the power to cause such proportion of fence, after due notice to be made or repaired, and making the proprietor so neglecting responsible to the fence viewers for double the expense of making and repairing such fence. It also provides that in the event of adjoining proprietors differing as to the part or proportion of a new division fence to be used by each, the nearest fence viewer shall decide the same, but it does not give either to the proprietors of any land adjoining the land of another or the fence viewer employed to make or repair a partition fence any right to make such fence partly on the land of one proprietor and partly on the land of

the other, although I am inclined to think that many, if not the greater part of the ordinary rail or *Virginia* fences, as they are called in this Province, are by common consent generally so made.

It is obvious that a fence viewer under this act has no power or authority to fix and establish any line of division or boundary between the adjoining owners of land. He is merely required to decide what proportion of fence each proprietor is to make when the boundary or division line is fixed or assented to, and to make the fence thereon in case either of the proprietors, after due notice, shall neglect to make it. The common law rule as to the making of partition fences being, as I think, in force here, that rule as laid down by *Lawrence, J.*, in *Vowles v. Miller*, must, in my opinion, prevail in the present case. "No man," he says, "making a ditch can cut into his neighbor's soil, but he usually cuts it to the very extremity of his own land. He is of course bound to throw the soil which he digs out upon his own land, and often, if he likes it, plants a hedge on the top of it; therefore if he afterwards cut beyond the edge of the ditch which is the extremity of his land he cuts into his neighbour's land, and is a trespasser." The same principle must of course apply to the making of a partition fence, which a party is not at liberty to make beyond the extremity or boundary of his own land.

In *Massachusetts* a different, and, it may be, a more reasonable rule prevails. In that State partition fences and ditches are placed on the land of both parties equally, *vide Newell v. Hill*, 2 Metcalfe's R., 180, cited at the argument by *Mr. Gray*. I have read that case carefully, and am strongly impressed with the forcible reasoning of the learned Chief Justice *Shaw*, by whom the judgment of the Court was delivered, so much so that if I were at liberty to take that case as an authority to govern my decision in this, I would not hesitate to adopt the principle it lays down, which recommends itself to my mind as just and well adapted to the requirements of the people of this country, who, as I have already remarked, I believe, in many, not in most cases, practically carry out that principle, but as the Legislature of this Province has not spoken on that subject as the Legislature of the State of *Massachusetts* has, we are necessarily thrown back upon, and bound to decide the case

upon the principle of the common law, the wisdom and soundness of which it is not for us to question. In *Doe dem. Pring v. Pearsey*, 7 B. & C., 307, *Holroyd, J.*, says: "Generally speaking, where an enclosure is made the party making it erects his bank and digs his ditch on his own ground on the outside of the bank. The land which constitutes the ditch in point of law is part of the close, though it be outside of the bank." This being the rule at common law as to the making of a ditch or fence separating adjoining lands belonging to different owners, we must examine the evidence contained in the report of the trial to see if the defendant, in erecting the fence in question, has departed from that rule, and committed any act of trespass on plaintiff's land sufficient to support the verdict which the jury have found.

It is impossible to read the evidence without regretting that for trespasses so small as those complained of some course was not adopted to prevent the necessity of bringing the present action, which probably never would have been brought if a more friendly feeling than there appears to have been had existed between the contending parties. It is, however, before us, and we must deal with it as we would if it were a more important matter than it is. There was conflicting testimony as to the depth of the plaintiff's lot, which I do not consider as at all material in the consideration of this case, since it is manifest from the evidence on both sides that the present as well as the previous possessors of the respective lots always held by the line of the old fence, on which the new fence, according to the testimony of *Caldwell*, the builder of it, appears to have been erected. His testimony, though called on the part of the defendant, is decidedly against him, and is of itself enough to support the verdict. He says that the three posts to which the boards of the new fence were nailed were placed on the north or plaintiff's side of the fence, shewing conclusively that if the new fence is exactly on the line of the old, as he says it is, the new posts, which are six inches square, are to that extent an encroachment on the plaintiff's lot. The new posts, too, were shod, and the holes made to receive them were consequently larger than the old, which, it seems, were not shod, and therefore to admit of the shoes being affixed to the new posts it was necessary to dig into the plaintiff's land, as



*Caldwell* himself admits, twenty inches north of the posts. The digging of the holes for, and sinking and embedding of the shoes to a considerable depth in the plaintiff's land without his consent and against his will must, it appears to me, also be regarded as acts of trespass. Again, *Caldwell* admits the cutting of some of the roots of plaintiff's hawthorn tree, which stood eight or ten inches north of the boards of the fence. When the fence was put up and boarded he says the tree was standing exactly as before, but when he saw it again the day before the cause was tried it was then leaning over, but healthy. The cutting of some of the roots of the tree did not destroy its vitality, though its leaning posture may have injured its appearance. This, though a trifling matter, was yet another act of trespass on plaintiff's lot, for which, together with the other trespasses before adverted to, the jury found a verdict in favor of the plaintiff for eight dollars damages.

It was objected that the damages, small as they are in amount, were excessive. In answer to this objection I may say that if I had been a juror in the cause, I do not think I would, under the circumstances, have given as much, but the jury having been instructed, as we think rightly, that the acts committed by the defendant's hired servant were in strict law trespasses, it was for them to fix the measure of damages, and with that measure both parties must be content.

We are all of opinion that the rule for setting aside the verdict must be discharged with costs.

DECISIONS  
OF THE  
SUPREME COURT OF NOVA SCOTIA,  
DECEMBER TERM, 1870-71.

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SCOTT v. McNUTT ET AL.

A PLAINTIFF in ejectment proved to be entitled as a tenant in common, and with a defined interest as such, has a right to recover, subject to the rights of the other tenants or their legal representatives, against a stranger, although such plaintiff claims a right of possession to an entirety.

A purchaser at a Sheriff's sale may appoint a third person to receive the deed.

WILKINS, J., now, (December, 1870,) delivered the judgment of the Court:—

This is an action of ejectment brought by the plaintiff to recover from defendants a tract of land situate in *Stewiacke*. The defendant *McNutt* limited his defence to one-ninth of the premises, disclaiming for the remaining eight-ninths. The defendant *Sibley* disclaims for one-ninth, denying the plaintiff's right to the possession of eight-ninths. The plaintiff rests his claim to recover on a Sheriff's deed, dated 17th March, 1867, which recites a judgment obtained by one *Smith* against the defendant *McNutt*, and an execution, levy and sale at auction thereunder to one *King*, purchaser at the sale, by whose appointment the deed was executed to the plaintiff. The premises conveyed are described as a certain tract with metes and bounds, "being all that part of the *Anthony Marshall* grant now owned and occupied by the said *Alexander McNutt*." The Court, empowered and required to draw inferences from the facts proved, cannot but conclude that one *Phineas McNutt*, (father of *Alexander*,) who died in *September*, 1849, considerably less than twenty years before the commencement of this action, on what the witnesses call "the farm," "the place,"

and "the premises in dispute," phrases indifferently used in relation to the tract of land described in the deed to the plaintiff, which they had heard read, and who had lived and brought up a family on it, during a period of twenty years that elapsed between his first occupation and his death, and who died intestate, was seized in fee at the time of his death. The defendant *McNutt* says, indeed, that his father never had any right to the place, and never claimed any right to it, but this, of course, cannot countervail the presumption of a seisin in fee derivable from the long possession of the father.

It appears that the old man, at his death, left nine children, lawful heirs, the offspring of himself and his widow, who lived on the farm at and after his death. Of these, *Alexander* was one. At that time, and at the execution of the deed, and at the trial, defendant, (*McNutt*,) lived on the premises, but from his father's death until the Sheriff's sale his possession was, in law, the possession of himself, and the co-heirs having an interest in common with him. On the execution of the Sheriff's deed, as recently as 1867, he ceased to have any interest as a co-heir. If he, then, was interested in any other respect all the last-mentioned interest, of course, also passed, by the deed, to this plaintiff. Did he subsequently acquire any other right or interest in the premises? He answers, conclusively, that question by saying: "I never, at any time in my life, had any right or title to the place. I only lived on it." It is clear, then, that the only interest which plaintiff is proved to have taken under his deed was the interest that *Alexander* had, and that that interest was one undivided ninth part of the premises in question. The Court entertains no doubt that it was competent to *King*, the purchaser at the sale, to appoint this plaintiff to receive the deed, this plaintiff who paid the purchase money, instead of subjecting the parties, or any of them, to the unnecessary expense of an extra deed of conveyance. It only remains, then, to enquire as regards the defendant *Alexander*, whether the plaintiff, proved to be legally entitled to that one undivided part of the estate, (as a tenant in common,) which *Alexander* once owned, can, as such, recover against *Alexander*, a mere stranger to the title, and clearly a trespasser as respects the plaintiff's possession of the whole premises of which old *Phineas* died seised. It appears

to me quite clear that the affirmative has the support of principle and authority. His undivided interest extends over every part of the whole land in question. If he were to make a formal entry to-morrow, his entry being lawful, and as against a stranger, it would, in law, be an entry for himself and the other tenants in common who are not on the record.

The principles of law that govern the facts are too clear to require authorities to be cited. These are that a plaintiff in ejectment, proved to be entitled as a tenant in common, with a defined interest, as such, in and to the land, can recover against a stranger, though he claim a right of possession to an entirety, unless the stranger defend as a tenant in common, for his own alleged interest as such, and recognize the tenancy in common of the plaintiff. Here the defendants do not, nor does either of them defend in respect of tenancy in common, and both are strangers to the title, and the plaintiff has proved his title as tenant in common, with others not on the record, to one undivided ninth. That, of course, extends over every part of the land in respect of which the tenancy in common is proved to exist. See *Doe d. Gill v. Pearson*, 6 East., 173; *Doe d. Raper v. Lonsdale*, 12 East., 39; *Doe d. Lulham et al. v. Fenn*, 3 Camp., 190.

As regards the defendant *William Sibley*, there can be no doubt of the plaintiff's right to recover the possession as against him. He is not one of the heirs-at-law of *Phineas*; his mother, one of the daughters of this last, being alive at the time of the trial. Nor does he defend as tenant with the plaintiff. He says that he went on the place by authority of his mother and *William McNutt*, since deceased, that he remained on the place about a year, and, after a year and a half, returned. On his cross-examination he stated that it was as much as seven or eight years before the trial that his mother told him he might go on the place, and that he did not go on then. He says: "I had heard that *Scott* had a deed before I first went on the place." The plaintiff says: "It was months after I bought that *Sibley* went on." Defendant, (*McNutt*), says: "*Sibley* came on the place a year before it was sold, and remained nearly a year, and moved away leaving part of his stuff, and returned after the sale." He was proved to be living with his wife and children on the place under and by the

permission of *McNutt*, and, to some extent, as his servant. It appears, then, that he has failed so to connect his assumption in right, interest, or authority with his mother or with *William McNutt* as to be entitled to hold the possession as against the plaintiff, even supposing his plea to enable him to do so. The plaintiff, then, has, in view of the pleas and of the evidence, a clear right to possession of the whole premises sought to be recovered, subject to the rights of the other heirs of *Phineas*, or those who legally represent them, and neither of the defendants has shewn any right to the possession of the premises for which they respectively defend, or to any part thereof.

The plaintiff, therefore, is entitled to judgment.

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### THE QUEEN v. STOWE.

THE defendant, a corporal of the 16th Regiment, was tried for the murder of James White, a private of the regiment, and convicted of manslaughter. It appeared from the evidence given at the trial that White, having been placed in confinement, while in a state of intoxication, the defendant with two men were ordered by Stevens, a sergeant of the regiment, to have the deceased tied so that he could not make a noise by shouting and kicking. The order was not executed in such a manner as to entirely put an end to the noise, and a second order was given to tie up the deceased so that he could not shout. In carrying out the latter order Stowe caused the deceased to be placed on the floor, face downward, with his hands cuffed behind his back, a rope was fastened to his feet which were drawn up behind his back, and the rope passed over his shoulders, and across his mouth, and back again to his feet.

*Held*, in reply to two questions reserved for the Court by His Lordship the Chief Justice, who presided at the trial, that whether the illegality consisted in the order of the sergeant or in the manner in which it was carried out, Stowe might properly be convicted.

*Also*, that the jury were justified in finding that the death of White was caused or accelerated by the way in which he was tied by Stowe, or by his directions.

RITCHIE, J., now, (December, 1870,) delivered the judgment of the Court:—

His Lordship the Chief Justice, before whom the prisoner, a corporal of the 16th Regiment, was tried for the murder of *James White* and convicted of manslaughter, has submitted the following questions for the opinion of the Court:

1st. Admitting the evidence in the minutes to be worthy of credit, as the jury have considered it, was the prisoner justified by the order of *Sterens*, the sergeant, in doing to the deceased what he did or directed to be done.

2nd. The deceased having been in a state of intoxication, is the prisoner legally liable for his death, as having been caused or accelerated by the tying.

The extent of the order given to *Stowe* was to have the deceased so tied that he could not make a noise by kicking and shouting. *John Morris*, a sergeant of the 29th Regiment, says: "I heard *Stevens* tell *Stowe* to have *White* tied more securely, so that he could neither kick nor shout, or words to that effect. *Stowe* went towards the cell, and when he came back he said he had tied him. I heard a lamentable cry; not a shout. I heard no shout afterwards. There was but one cry." *Henry White*, a private of the same regiment, says: "I heard *Stevens* tell the corporal, (*Stowe*,) and two men to tie up the deceased. The three returned, and I heard *Stowe* tell *Stevens* that he had tied *White* up. I heard *White* moaning after that. I heard no shouting after that." On his cross-examination he said he could not say whether he heard *White* moan. *William Rowlan*, a private of the 16th Regiment, says: "*White* was screeching and noisy. *Stevens* ordered the three prisoners to go and secure him. Afterward *Stevens* ordered the three prisoners to make him more secure. He ordered them to tie him up so that he should not shout. The corporal, (*Stowe*,) and the same two men went out to execute the second order. I heard no shouting after that, but a pitiful cry, very low. No one went to his relief that I know of. *White* was making a noise with his feet and body. This led *Stevens*, I suppose, to give the second order." The mode in which this order was carried out by *Stowe*, appears from the evidence of *Morris*, who saw *White* as soon as the ropes were removed, immediately after his death, and *Thomas Johnston*, a private of the 29th Regiment, who saw him when tied. *Morris* says: "I went into the cell. *White* was lying on the broad of his back. He had no fastening on him. I undid his tunic and rubbed his stomach. He was quite warm. I observed a mark from the corner of his mouth under his ear to the back of his neck. The dent was that of a rope. Could put my two fingers in the dent. I put cold water on his temples. There was blood on the ear." *Johnston* says: "*White* was lying on his chest on the floor with his hands cuffed behind his back. The rope was fastened to his feet. The feet were drawn up

to his back and the rope over his shoulders and across his mouth to his feet again behind his back. Can't speak of the size of the rope. I could not see *White* move after he was tied, nor hear him speak nor make any noise after that. The next time I saw him he was lying dead."

The first question that suggests itself is whether the order of sergeant *Stevens* necessarily called for the cruel treatment which the deceased experienced at the hands of *Stowe*. If so, it was an illegal order, and, being such, *Stowe* would be liable to punishment for obeying it. If, on the other hand, the order might have been obeyed without the risk of injury to the deceased, then the order would have been legal, and the illegality would have consisted in the mode in which it was obeyed. In the former case the guilt would have been shared by the sergeant and his subordinate; in the latter, the subordinate alone must bear it. A soldier is bound, implicitly, to obey the commands of his officer, but they must be legal commands, for a soldier who does an illegal act cannot plead the command of his superior officer as a legal defence in a court of justice. It may be difficult for a soldier, sometimes, to decide when the orders of a superior and the laws of the land conflict. In time of war, and as against an enemy, such a conflict can hardly be imagined; but, in time of peace the soldier must take care not to violate, or co-operate in the violation of the law which is equally binding upon him as on other citizens, for, as observed by *Manesfield*, C. J., in *Burdett v. Abbot*, 4 Taunt., 449, men, by becoming soldiers, do not cease to be citizens, and a soldier is gifted with all the rights and is bound to all the duties of other citizens. The jury, by acquitting *Stevens* and convicting *Stowe*, must have considered that the illegality consisted in the manner in which the order was obeyed and not in the order itself, and there is evidence to justify them in coming to that conclusion; but whether the illegality consisted in the order itself, or in the mode of carrying it out, *Stowe* was not justified in doing to the deceased what he did or commanded to be done. There are points in the case of *Rex v. Huggins*, 2 Lord *Raymond*, 1574, and in that of *Reg. v. Walters*, 1 Car. & Mar., 170, which have an application to the present. In the former the deceased had been imprisoned in an unhealthy room in

the *Fleet* prison and had died there from the effects, *Huggins* being the warden of the *Fleet*, and *Barnes* being his servant, employed about the care of the prisoners, under *Gibbons*, the deputy of *Huggins*. The deceased was placed in the room by *Barnes*, who knew its unhealthy state. *Huggins* had been present and saw the deceased in the room.

In that case two questions arose. What crime the facts found against *Barnes* would amount to, and whether *Huggins* was guilty of the same offence. As to the first, the Court, in giving judgment, say it is very plain that the facts found as against *Barnes* amount to murder. The reason why the law implies malice in such cases is plain. It is because it is a breach of his duty, and of the trust which the law has reposed in him. A prisoner is not to be punished in jail, but to be kept safely. The act is deliberate, and the nature of it is such that it must, apparently, do harm. It is also cruel, as it is committed on a prisoner who cannot help himself, and it is committed by force and without the consent of the prisoner. But the Court held that *Huggins* should be acquitted, as the act was that of *Barnes* and not his, and it was not found that he knew any of the circumstances, the state of the room, &c. Even though he had once seen the prisoner locked up in the room, it does not follow that he was acquainted with the several facts, or that any complaint was made to him, and a marshal cannot be made answerable criminally for the act of his under officer.

The other case shows what would reduce to manslaughter an offence of this character. There *Cockburn, J.*, said: "If a party do an act with regard to a human being, helpless and unable to provide for himself, which must necessarily lead to death, the crime amounts to murder; but if the circumstances are not such that the party must have been aware that the result would be death, that would reduce the offence to the crime of manslaughter, provided the death was occasioned by an unlawful act, but not such as to imply a malicious mind.

The next question submitted by His Lordship the Chief Justice is whether *Stowe* can be legally found guilty of manslaughter, if the death of *White* was occasioned or accelerated by the treatment he received. All the medical witnesses give it as their opinion that the death of *White* was to be attributed to the mode in which he was tied while



in a state of intoxication ; in other words, to the tying and intoxication combined.

In *Rex. v. Webb*, 1 M. & Rob., 405, which was an indictment for manslaughter for administering to a party suffering from small-pox noxious substances for wholesome and proper medicines, Lord *Lyndhurst*, C. B., said : "It is true the witnesses do not say whether the deceased would, in their opinion, have died of the small-pox, if the pills had not been administered ; but they all agree in this,—that his death was accelerated by the pills, and he put it to the jury whether the death of the deceased had been occasioned or accelerated by the medicines administered by the prisoner."

In *Rex v. Martin*, 5 C. & P., 130, Mr. Justice *Parker* said : "It is urged that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate the death, he must answer for it." See also *Russell on Crimes*, vol. 1, p. 405.

The Chief Justice charged the jury in accordance with these principles, and the jury were justified, under the evidence, in finding that the death of *White* was caused or accelerated by the way in which he was tied by *Stowe* or by his directions.

## THE ATTORNEY GENERAL, ON THE RELATION OF KIRK v. McDONALD.

COCHRAN'S HILL, Sherbrooke, was proclaimed a gold district on June 2<sup>nd</sup>, 1868. On the 13<sup>th</sup> of the same month the relator, not being aware of the proclamation, made application for ten areas in accordance with the terms of chapter 25 R. S., (3<sup>rd</sup> Series,) section 36, describing the same by metes and bounds. Previous to this, several applications for areas had been made, but none of them gave a description of the areas applied for by metes and bounds. On the 19<sup>th</sup> June the areas in question were located and given to defendant.

*Held*, that something more is required than a mere proclamation before applications for areas can be made under any other section of the Act than section 36,—areas must be laid off in a particular way, plans prepared, &c.

*Held* also, that the application of the relator was made so in accordance with the spirit and provisions of the Act, as to give him a right to claim a lease as against prior applicants whose applications failed to comply with the provisions of the law.

*Per WILKINS, J.*—The defendant being in possession under a lease from the Crown, is not to be regarded as a trespasser or intruder on the lands of the Crown.

RITCHIE, J., now, (December, 1870,) delivered the judgment of the Court :—

The information in this case seeks to have a lease of certain gold mining areas set aside as having improvidently

issued to the defendant after a previous application had been made for them by the relator. It appears from the evidence that *Cochran's Hill* at *Sherbrooke* was proclaimed a gold district in the *Royal Gazette* of the 3rd of *June*, 1868. On the 13th of that month the relator made his application for ten areas in the words following:—

“ *June 13th, 1868.*

An application for mining areas on class No. 1 on *Cochran's Hill*, east of the *Sherbrooke* present road, starting from a stake or tree marked K and running easterly 750 feet to a stake marked K; thence from that stake or tree northerly to a stake or tree marked K 500 feet; thence west 750 feet to a stake marked K, and thence to a stake southerly 750 feet to the starting stake marked K, enclosing ten areas.

“ KENNETH KIRK & Co.”

*Mr. Pye*, the Deputy Gold Commissioner, to whom the application was made, refused to receive it, as he says, because it mentioned tree or stake at the several corners and did not specify what, and had not on it the words, “if not interfering with previous applications.” The application was thereupon re-modelled by his clerk, under his directions, and is in these words:—

“ Application is hereby made for a lease of ten mining areas not numbered, but on *Cochran's Hill*, beginning about ten rods to the eastward of the present main road near the highest part of the said road, at a tree marked K; thence easterly 750 feet to a tree marked K; thence northerly 500 feet to a tree marked K; thence westerly 750 feet to a tree marked K; thence southerly 500 feet to the place of beginning. Said corners liable to be altered to suit survey, if not interfering with previous applications on plan of said district.

“ Dated this 13th day of *June*, A. D. 1868.

“ KENNETH KIRK.”

*Mr. Kirk* objected to the insertion of the words “if not interfering with previous applications.” The Deputy Commissioner insisted on their insertion, and would not receive the application without them. Both applications were left with the Deputy Gold Commissioner to whom the money for the areas was then paid, (\$20,) for which a receipt was given, in

which the descriptions of the areas is repeated. No survey or plan of the *Cochran Hill* gold district had been made at the time, but a plan was prepared a few days after. Previous to the application of *Mr. Kirk* several applications had been made by the defendant and others, but none of them gave a description of the areas applied for by metes and bounds, nor was there anything in them to indicate that they had been ever marked out, or that they were in the neighbourhood of those applied for by *Mr. Kirk*, the relator, other than that they were at *Cochran's Hill*. It is in proof that previous to *Mr. Kirk's* application he had the land he applied for measured and indicated as described by marked trees at the several corners, and that the areas so marked comprise those now in dispute. On the 19th of *June*, that is, six days after *Mr. Kirk's* application, the areas in question were located and given to the defendant. As soon as this came to the knowledge of *Mr. Kirk*, some few days after, he applied to *Mr. Robertson*, the Chief Gold Commissioner, on the subject, explained to him the circumstances under which he had made his application, and asserted his right to a lease, but could get no redress, the Chief Gold Commissioner telling him he had the power to give the lease to any one he pleased. Subsequently, about two and a half months after his first application for the areas, he made a demand on *Pye*, the Deputy Gold Commissioner, for the areas, when he was told the defendant had them, and that he could not get them. *Mr. Pye* then wished to return *Mr. Kirk* the money he had paid, which he refused to take.

The statements in the information of the relator relative to the application of the defendant, and the form and mode in which it was made, have been fully sustained by the evidence, and the learned Judge in Equity, in his judgment on the demurrer on this case, has decided, and, in my opinion, has correctly decided, that it was not made in the mode pointed out by the act. It did not define a particular lot, and was not an application for the areas embraced in the relator's application. And he has also decided, and in my opinion correctly decided, that when a party has made an application for an area in accordance with the terms of the act, he has acquired a right to a lease which could not be legally set aside or passed over by the Commissioner of Mines, and that should he do so and

grant a lease to another, such lease should be set aside as having been improvidently granted.

We have now to consider whether the application of the relator was made in accordance with the provisions of the act, so as to give him a right to claim a lease from the Commissioner of Mines as against prior applicants who have failed to comply with the provisions of the law. It was objected at the argument that the relator, having made his application under section 36 of chapter 25 of the *Revised Statutes*, on the assumption that *Cochran's Hill* was not then a proclaimed gold field, when in fact it had been so proclaimed, is not on that account entitled to the relief he seeks. It is true that shortly before the relator's application a proclamation had declared *Cochran's Hill* to be a gold district, but more was required to be done before applications could be made for leases in it under any other provisions of the act than those contained in section 36. Areas were to be laid off in a particular way and of a particular size; a plan was to be prepared with the areas laid off distinctly marked thereon; and as each applicant filed his written application, and paid for a mine, the name of the applicant was to be written on the area or areas applied for. When the relator made his application areas had not been laid off and no plan had been prepared, so that applications, if made at all, could only be made under the 36th section. As I read the act, applications are to be made under the 14th and 15th sections when the areas are within a gold district laid off as prescribed, so as to enable the provisions of those sections to be carried out, otherwise, under the 36th section, which provides that when the mine is not within any proclaimed gold district the rights of parties, and the proceedings to be taken with reference thereto, shall be governed as far as possible by the spirit and provisions of the chapter, and that parties occupying and staking off areas corresponding in size with those presented shall be entitled to priority in the order of their making applications, and, in case the land so applied for shall afterwards be included in any gold district, and laid off as thereinbefore described, the rights of the occupants shall be respected, so far as is consistent with the terms of the chapter, in adjusting the boundary line between the parties in occupation. This section of the act shews the intention of the

Legislature to have been that applications for leases might be made at any time for areas wherever situate, whether within or without the limits of a gold field, the applicants to be governed by the spirit of the act when it was not possible to comply with the letter of it. The Deputy Commissioner of Mines must have taken the same view that I have, as he accepted the application of the relator, in accord with the terms of the 36th section, after he had remodelled it, and received the money for the areas, and it would be most unreasonable to hold that the first claims of the relator, who has done everything in his power to comply with the law, should be defeated by the dereliction of duty, or remissness, of the officers in the department in not having made the necessary survey and plans to enable them to carry out the provisions of the act, and that too in behalf of the defendant, to whom they have leased the areas without his having complied with the law so as to have given him any right whatever to them.

It was also urged at the argument that the relator had made his application subject to the right of previous applicants, though the Deputy Commissioner of Mines had no right to insist on the insertion of any such stipulation in the application. Yet assuming that he had, and that the relator agreed to it, the law gives the right to a lease to the first applicant, and if the defendant had made an application for the areas in question prior to the relator's, he would have been entitled to them whether the words referred to were in the application or not. They can only be held to apply to previous applications made in accordance with the law. It was also contended that the act required each area applied for to be staked off separately and occupied. I think it is sufficient that the areas were comprised in one block containing ten acres of the shape and size given by the act, and that the law was complied with by the relator going on the land and measuring and defining the block by trees marked at each corner. "A description of the lot," the Deputy Commissioner says, "superior to that required by law, (meaning, I suppose, that it was defined by better monuments,) that is, by marked trees instead of by stakes."

I need hardly refer to another point raised that the relator had forfeited his right to relief by delay in demanding his

lease. It is enough to refer to the evidence on this point to shew that there has been no laches on his part. On the 13th *June* he made his application and paid his money. On the 19th the areas were assigned to the defendant. On the 23rd or 24th of the same month he made his complaint to the Chief Commissioner of Mines, who not only refused him redress, but claimed the right to give the lease to whom he pleased.

To the remaining objection that the relator had not made a settlement with the owner of the land, I would remark that it was not necessary that he should have agreed with him, or had the damages assessed and paid, before the application was made for a lease of the areas, and no time was allowed him to do so after, in consequence of the allotment of the areas to the defendant within a week of his application, and I may add that these were not the grounds on which the relator was refused his lease.

I am of the opinion that the rights of the relator have been violated by the grant of the lease of the areas in question to the defendant, and that the honor of the Crown as well as the rights of the relator require that it should be set aside as having been improvidently made.

WILKINS, J.—This is an appeal from the decision of the Judge in Equity overruling the demurrer to the information of the Attorney-General praying that leases of certain mining areas should be annulled and set aside as having been granted by the Chief Commissioner of Mines improvidently and in derogation of the rights of private individuals. The information set forth that on the 13th of *June*, 1868, the relator made an application, under section 36 of chapter 25 of the *Revised Statutes*, to the Deputy Commissioner of Mines at *Sherbrooke*, for a lease of ten areas situate at *Cochran's Hill*, in the County of *Guyborough*, which was then not included in any proclaimed gold field, and that the lands so applied for were, prior to such application, occupied and staked off by the said relator, pursuant to section 36 of chapter 25, which application was in writing and defined the areas applied for pursuant to the 16th section, and the price or sum of \$20 was paid to the Deputy Commissioner by the relator, being the sum required by law to be advanced and paid for the areas of class No. 1,

pursuant to section 17, and a receipt given therefor, and all other lawful acts and things required by law were done by the relator to vest in himself a legal and equitable right to have granted to him, for gold mining purposes, a lease for twenty-one years of the lands mentioned and defined in such application, or in areas corresponding therewith in case such lands should afterwards be included in any gold fields, pursuant to section 36; that shortly after the making of this application the district of *Cochran's Hill* was laid out and surveyed and proclaimed as a gold district, and a plan thereof made on which the land so applied for was found to correspond with and cover ten areas, being Nos. 530, 531, 532, 533, 579, 580, 581, 582, 583 and 629.

The information went on to shew that other applications had been made previously to that of the relator by the appellant and others, that those of the appellant were not only undefined in their own boundaries, but were based and bounded on several prior applications, each of which was entirely undefined, and none of them were in any respect in conformity with the requirements of the law. It was also stated that the applications so irregularly made, covering in all about twenty-five mining areas, were designedly or otherwise so described as bounding on each other that they could be extended in any direction whichever way the richest leads should afterwards be discovered, and they were so extended in a direction towards the areas which had been selected and staked off and only applied for by the relator, whereby they were made to embrace six of such areas, and the Commissioner of Mines was induced to give, and did give to the appellant a lease of such six areas, being Nos. 531, 532, 533, 581, 582 and 583.

Assuming these statements to be true, and the demurrer admits them to be so, the relator has in all respects complied with the provisions of the law in the application made by him, while the appellant is admitted not to have done so in the applications made by him. The only question, therefore, on the demurrer is whether in such a case it is in the power of the Commissioner of Mines to exercise a discretion independent of the provisions of the act and make a lease to an applicant who has not complied with its terms in derogation of the rights of one who has complied with them, and it was contended on the

argument that though the relator may have made his application strictly in accordance with the provisions of the law, and the money required by the act may have been paid to the Commissioner of Mines, he had no legal right to require a lease, but that the Commissioner of Mines could lease to others at his discretion, and the judgment of the Judge in Equity in *Beamish v. Robertson et al.* was referred to as an authority for that position. But there is nothing in that judgment to indicate that the learned Judge considered that the Commissioner of Mines could exercise any such discretion or had any authority beyond that which the act conferred on him. What he did say on the subject had reference to a control which the Provincial Government, in the exercise of the royal prerogative, might have over the disposal of coal mines where the public interests were to be subserved, while he admitted that the exercise of the royal prerogative itself was greatly curtailed by the Provincial enactments.

The power of the Commissioner of Mines to grant leases of mining areas is derived solely from the act, and the Legislature has thought fit specially to direct how that power is to be exercised without conferring upon him any discretion. The object of the Legislature doubtless was to confer on parties who should first make their application in conformity with the provisions of the act a right of priority over others. In *The Queen v. Hughes*, 3 Moore P. C. C., N. S., 447, which was an application to set aside a lease of Crown land granted by the Governor of *South Australia*, under an act of that Province authorizing him to make leases, Lord *Chelmsford*, in giving judgment, on appeal to the Privy Council, said a statutory power is given to the Governor in this case to be exercised over the Crown lands, and this power must be strictly pursued, and again, he says, it must be borne in mind that the Governor, in creating these leases, was not exercising any delegated authority from the Crown, but a mere statutory power conferred on him. If the Governor of a Province dealing with Crown lands under a statute is thus restricted by its provisions, surely no greater power can be exercised by the Commissioner of Mines, whose office is created by the act, and who derives all the authority he possesses from its provisions.



It was urged on the argument that an information would not lie in this case. This objection appears not to have been taken before the Judge in Equity, and it is not among the grounds of demurrer, but if it were open to the appellant to take it, it is only necessary to refer again to *The Queen v. Hughes*, where the proceedings were by *scire facias* to revoke the lease, and the objection was taken that the Supreme Court had no jurisdiction to proceed in that way. The Court decided that *scire facias* would not lie, and Lord *Chelmsford* said: "It was argued on the part of the respondent that if *scire facias* does not lie, the appellant will not be without remedy, as the lessees may be impeached either by writ of intrusion or information in Chancery. There can be no doubt that the modes pointed out by respondent are applicable to the grant of the lease in question. If the Governor has not strictly pursued the statutory power conferred on him the leases are void, and the lessees are intruders upon the lands. The remedies which have just been adverted to are strictly applicable to the respondent's unauthorized possession of the lands of the Crown."

This is a direct authority for proceeding by information before the Judge in Equity in the present case, and we are of opinion that the judgment of the Judge in Equity should be affirmed with costs.

His Lordship delivered a separate opinion on the point of intrusion, as follows:—

On the main ground I concur in the opinion of the Court delivered by Mr. Justice *RITCHIE*, but I wish to guard myself from being supposed to concur in that opinion also as regards the mode of remedy adopted by the Attorney-General. I do not consider that the defendant can be regarded as an intruder on lands of the Crown. If the facts were such as to shew that the lease, to vacate which, is the object of this proceeding in the Court of Equity, was clearly and beyond argument an absolute nullity, then the defendant, having entered under it without the authority of the Crown, and persisting to hold against the Crown, would be a mere intruder, and information filed against him, as such, would be the acknowledged mode of proceeding on behalf of the Crown. That is clear as a principle well

known and recognized by Lord *Chelmsford* in delivering the opinion of the Judicial Committee in *The Queen v. Hughes*. The Crown proceeds by process of intrusion in circumstances analagous to those under which the subject could sustain *trespass quare clausam fregit*. In *The Queen v. Hughes*, the leases in question were, to use Lord *Chelmsford's* language at page 451 of 3 Moore, "assumed, for the purposes of that case, to be void on the indisputable ground that the lands leased, (in violation of the legislative power which sanctioned them,) exceeded the prescribed quantity of eighty acres. Not only so, but it was conceded that the fact was so." On page 443 of the case we find this statement: "From this judgment the present appeal was brought. It was assumed for the purposes of the appeal that the leases in question were voided, being for quantities of land exceeding eighty acres, the limit named in the 13th section of the *Waste Lands Act*, 21 Vic., No. 5." In view of that fact, Lord *Chelmsford* says, (p. 454): "In the present case a statutory power is given to the Governor to be exercised over the Crown lands. This power must be strictly pursued. The leases which he is authorized to make are limited to the extent of eighty acres. The quantity is said to be exceeded in the leases in question, and if so they are altogether void, and the lessees are intruders on the lands. The remedies which have just been adverted to are therefore strictly applicable to the respondent's unauthorized possession of the lands of the Crown."

I cannot regard the defendants, as in the same position with the defendant in *The Queen v. Hughes*. I cannot view him, lessee under the grant and lawfully in possession, as a trespasser or intruder on the lands of the Crown. Whether the lease in his case is to be avoided depends on the results of this case, on which much argument has been heard, and the judgment of the Court has just been given. It was certainly not a nullity, and certainly not when this proceeding by intrusion was institutable.

## FERGUSON v. INMAN.

DEMURRERS to two counts of plaintiff's writ in an action of slander, the innuendo in both counts being that the plaintiff had been guilty of wilful and corrupt perjury. The demurrer was on the ground that the words were not actionable in themselves, and did not support the innuendo.

*Held*, that the counts were good, and that it was for the jury to say whether the plaintiff was warranted in putting the meaning upon them set out.

RITCHIE, J., now, (December, 1870,) delivered the judgment of the Court:—

The grounds of demurrer to the first and second counts of the plaintiff's writ are that the words therein alleged to have been falsely and maliciously spoken and published of the plaintiff do not impute any criminal offence and are not in themselves actionable, and, secondly, that the words do not support the innuendo.

The cases cited on the argument were all of them decided previous to the *Common Law Procedure Act*, since which time the words set forth must be actionable, either *per se* or on account of the particular meaning attributed to them in the count, and the pleader may put any construction he pleases on the words, and may leave it to a jury to say whether such construction is borne out by the evidence. *Selwyn's N. P.*, 1261. In *Homer v. Taunton*, 5 H. & N., 661, the words complained of were that plaintiff was a truckmaster, and there was no innuendo. It was very properly left to a jury to say whether they were, under the circumstances, used in a defamatory sense, and on the argument it was admitted that though words should not be actionable in themselves, they would be, if, by innuendo, they were shown to have been used in a defamatory sense.

Our attention has been turned, since the argument, to *Foulgar v. Newcome*, L. R., 2 Exch., 327, by *Mr. Henry*, but it does not support his case. There the words charged the plaintiff with trapping foxes, words not actionable in themselves, and all that was decided was that it should appear in the count that he was a game-keeper, and that it was his duty as such not to kill foxes, to make a good cause of action independently of special damage. In the present case no such question arises, and as the meaning given to the words in both

counts is that the plaintiff has been guilty of wilful and corrupt perjury, the counts are good, and it will be for the jury to say whether the plaintiff was warranted in putting that meaning upon them.

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### McDONALD v. McDONALD.

PLAINTIFF was applied to by D. J. M., defendant's son, for goods on credit to a large amount. The goods were selected, but plaintiff declined to deliver them unless he was furnished by defendant with a guarantee to cover any transactions which plaintiff might have with the son. The required guarantee was given on October 13th, 1866, between which time and December 31st, 1866, D. J. M. was debited with goods amounting, with interest, to the sum of \$984.04, and credited with payments during the same time amounting to \$720.50. The balance of \$263.54, thus left, was disposed of by being transferred to the debit side of an account with the firm of McDonald & Cameron, of which D. J. M. then became a member, and upon the credit side of the latter account several payments were credited to a larger amount than the balance so transferred, at a time when nothing was due from the firm.

To the plaintiff's declaration on the guarantee, defendant pleaded among other things that D. J. M. fulfilled to plaintiff the contract for which defendant became his surety.

*Held*, that the defendant was entitled to judgment.

*Held also*, that the defence set up in the plea was sufficiently pleaded.

Goods having been selected by D. J. M., and their delivery withheld until the guarantee was given, and there being thus material upon which the guarantee might operate in the plain literal meaning of the language contained in it,

*Seemle*, that the guarantee applied to the goods so selected, and was not a continuing one.

McCULLY, J., now, (December, 1870,) delivered the judgment of the Court :—

This was an action brought by *John McDonald* against *James McDonald*, and tried by His Lordship Mr. Justice DESBARRES, at *Pictou*, in *October*, 1868, when the jury disagreed, and the cause having been entered a second time in *October*, 1869, a rule was entered into by the consent of the parties, their attorneys and counsel that a verdict should be entered for plaintiff for the amount claimed on the evidence given on the former trial, subject to the opinion of the whole Court, with power to sustain the verdict, or enter a nonsuit, or grant a new trial.

The plaintiff's writ contains a count setting out that "in consideration that plaintiff would supply *D. J. McDonald* with goods on credit, defendant promised plaintiff that he, (defendant,) would be answerable to plaintiff for the same; that plaintiff did accordingly supply the said *D. J. McDonald* with goods to the amount of \$937 and upwards on credit; that such

credit has elapsed, yet neither the said *D. J. McDonald* nor the defendant has as yet paid for the said goods," with other counts.

There are several pleas. First,—That defendant did not promise as alleged. Second,—That defendant did enter into a guarantee to plaintiff for *D. J. McDonald*, but that *D. J. McDonald* fulfilled to plaintiff the contract for which defendant became his surety. Third,—That defendant terminated by notice the guarantee given by him to plaintiff for *D. J. McDonald*. Fourth,—That after the guarantee was given plaintiff discharged defendant therefrom. Fifth,—That the guarantee was obtained by fraud and misrepresentation. The last plea was abandoned on the argument.

The guarantee given in evidence was as follows:—

HALIFAX, 13th October, 1865.

I hereby agree to guarantee *Messrs. John McDonald & Co.* against loss on account of sales made to *D. J. McDonald & Co.*, of *New Glasgow*.

(Sgd,)

JAMES McDONALD.

Plaintiff, in his testimony given on the trial, states as follows: "I was a merchant in *Halifax* on October 18th, 1865, doing business under the name of *John McDonald & Co.*, but was sole owner of the stock. I was applied to by *D. J. McDonald*, son of defendant, for goods on credit in October, 1865, to the amount of about \$600 and probably more, which were selected for him. I did not give him the goods, because I felt that it would not be safe for me to credit him. I told him that as his father was in town, it would be necessary for him to get a guarantee to cover any transactions I might have with him, otherwise I would not continue an account with him. I afterwards had a conversation with defendant in reference to a guarantee. I explained to him the nature of the conversation I had with his son, and he consented to give me the guarantee. I required and he signed this paper on the 13th October, 1865." Such is plaintiff's version of that part of the transaction. The son, *D. J. McDonald*, denies that he had any conversation with plaintiff as to the guarantee, or knew anything of it till after it was signed. He says that immediately before the guarantee was given plaintiff asked him to go upstairs

with him, and asked him to buy goods. That he purchased goods to the amount of \$569.90 on *October* 14th, 1865. He says, further on, "I was present at plaintiff's office, and there found plaintiff and my father together. My father appeared to be signing a paper. I did not know what it was. My father, after signing the paper, turning to the plaintiff, said to him: 'You and *Dan* are young men. Never give him, (meaning witness,) another dollar's worth on my account.' \* \* \* I had no partner in my business at that time. All the goods which I purchased from plaintiff up to that time were paid for before any other supplies of goods became due." He produces two accounts and says: "The credits for goods purchased by me from plaintiff in *October*, 1865, are credited in both these accounts, and not all in one." These accounts were objected to by plaintiff's counsel, but, having been rendered by plaintiff and coming from him, they were rightly admitted. The first shews transactions of debit for goods supplied by plaintiff at various dates between *May* 9th, 1865, and *December* 31st, 1866, interest included, amounting to \$934.04, and payments within that time to the extent of \$726.50, leaving a balance of \$207.54 as due plaintiff from *D. J. McDonald*. The account closes with this balance due plaintiff, which is disposed of thus:—

"By balance transferred to *McDonald & Cameron*:  
\$207.54.

(Sgd,) JOHN McDONALD & Co."

(E & O E.)

*Per E. F.*

*Halifax, N. S., December 28, 1866."*

This account was headed "Dr., *Messrs. D. J. McDonald & Co.* in account with *John McDonald & Co.*," and, in it, among other things, is a charge of \$569.90 for goods supplied *D. J. McDonald*, *October* 12th, 1865. The second account produced is headed "Dr., *Messrs. McDonald & Cameron* in account with *John McDonald & Co.*," and among the items of debit *December* 31st, 1866, is the \$207.54 brought from *D. J. McDonald's* private account, as above set out, and thus charged to the firm account. On the opposite or credit side of this account is the sum of \$100 credited as paid plaintiff on the 11th *July*, 1866. *October* 30th, \$411, and on *December* 31st a balance is carried down to

partnership debit of \$229.46. As the goods charged in the company account were all purchased at six months, as appears upon the face, the payments of \$100 credited as of 11th *July*, 1866, and \$400 on *October* 30th were either for the goods supplied the witness, as he states, or they were payments by the company at a time the company owed nothing, a very unreasonable and unlikely thing.

The defendant was examined on the trial, as were other witnesses, and there was much and serious conflicting testimony on many points. But the main features of the transaction, the leading facts as proven by plaintiff himself, the guarantee and the accounts produced, suffice to shew the merits of the case for the purpose of deciding the present controversy. On the part of the plaintiff it was contended, first, that the contract was a continuing guarantee; second, that the defence of payment could not be set up in the state of the pleadings. Upon the first point a number of cases were cited, but the main case relied upon by plaintiff was that of *Hood et al. v. Grace*, 7 H. & N., 494. That was a judgment on demurrer to pleas where the guarantee was set out *in hæc verba*, and where there were no facts or surrounding circumstances by which to interpret the guarantee, which was as follows:—

“GENTS,—As *Mr. Davis* informs me you require some person as guarantee for goods supplied by you to him in his business. I have no objection to act as such for payment of your account.

Yours,

H. T. GRACE.”

The Court read the instrument, “for goods to be supplied.” *Bramwell*, B., in this case says: “Suppose in fact there had been no previous supply of goods by the plaintiffs to the debtor, the words ‘for goods supplied’ could not have their primary meaning, and, if not, they must have their secondary.” Here, taking the testimony of the plaintiff himself, the defendant had applied for and selected goods before the guarantee to the extent of \$569.90, as charged in his account, and before delivery plaintiff required the guarantee. In this respect the two cases widely differ, for here the goods had been selected by the debtor, but the delivery was withheld till the guarantee was given, and there was ample material upon which the guarantee

might operate in the plain literal meaning of the language it contains.

On the part of defendant it was contended that inasmuch as the action was brought by *John McDonald*, plaintiff, against *James McDonald*, defendant, upon a guarantee signed by *James McDonald*, guaranteeing *John McDonald & Co.* against loss on account of sales made to *D. J. McDonald & Co.*, there was such a variance between the guarantee set out in plaintiff's writ and that in evidence as must defeat the action. Second, that it was not a continuing guarantee. Third, that if the variance were not fatal and the Court thought the action sustainable against defendant on the ground that the debt guaranteed, on account of sales made, was the debt of *D. J. McDonald* and not of *D. J. McDonald & Co.*, and that the guarantee was a continuing one, then, under the second plea to which the evidence given by *D. J. McDonald* and the accounts produced by him were clearly applicable, the plaintiff must fail, because, being bound by his own account, plaintiff had never supplied *D. J. McDonald* with any goods after the date of the guarantee, and those then, or previously supplied, being paid for, the conclusion was inevitable that *D. J. McDonald*, in the very language of his plea, has "fulfilled to the plaintiff the contract for which defendant became his surety." On this last ground his counsel chiefly relied.

The answer to this, on the part of plaintiff's counsel, was that the state of the pleadings was such as prevented the Court giving effect to this condition of things, even if it existed, and for this *Roscoe*, 331, 10th Ed., and 10 *B. & C.*, 506, were cited. This case, certainly, furnishes no authority for such a position, and I can find no other. To avail himself of such a defence the plaintiff's counsel says defendant should have pleaded it. It seems to me that it would be difficult to find more apt words so tersely to plead the defence upon which defendant relies in his second plea than the language employed. The plaintiff, by his account, charges defendant, as a guarantor for *D. J. McDonald*, with a liability amounting to \$958.56, as shewn by his particulars endorsed on his writ. Defendant's answer, under his second plea, is "*D. J. McDonald* himself fulfilled to the plaintiff the contract for which I am surety. All the sales made by you to *D. J. McDonald*, I shew, by your



own account rendered to him, under your own hand, and by the same account rendered, I shew payments by him as sworn to, fully covering the amount. But when you seek to charge me with liabilities incurred by *D. J. McDonald* and one *Cameron*, for sales made to them jointly, even if the guarantee were a continuing one," (which I think, in this case, it was not,) as regards that portion of the claim, his answer is: "I never gave a guarantee in behalf of any person but *D. J. McDonald*." Without being required to decide whether the variance between the guarantee set out in the plaintiff's writ and that produced in evidence be or be not fatal, or whether the guarantee be or be not a continuing one, (on the latter of which points I entertain views strongly favoring the defendant's contention,) on the issues taken on his first and second pleas, beyond doubt, the defendant is entitled to judgment in this cause.

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### McFARLANE v. FLINN.

P. gave a young colt to H. P. who lived in his family, but there was no evidence of any delivery to H. P., or of any possession or use of the colt by him. On the other hand P. continued to feed and use the colt as his own until his death, previously to which he gave a bill of sale of it, among other things, to the plaintiff. Some time after the death of P., H. P. sold to the defendant, against whom the plaintiff brought trover. The jury having found in favor of the gift to H. P., it was

*Held*, on a motion for a new trial, that the facts mentioned were not sufficient to constitute a gift *inter vivos*, and that the Judge should have told the jury that no title passed to H. P., instead of leaving it them to establish the validity of the gift.

RITCHIE, J., now, (December, 1870,) delivered the judgment of the Court:—

In this action, which was trover for a horse, the plaintiff claimed under a sale from a man named *Porteus*, in *May*, 1865. This sale was for valuable consideration, and there is nothing in the evidence to impeach its validity if the horse was the property of *Porteus* at the time of the sale. The defence is that *Porteus* did not then own the horse, having, many years before, given it to one *Henry Porteus*, who lived in his family, from whom the defendant claimed, and also that the plaintiff had recognized *Henry Porteus'* transfer to him. *Henry Porteus* alleges, and his statement is corroborated by *Mrs.*

*Porteus*, the widow of old *Mr. Porteus*, that the old man gave the horse, now thirteen years old, to him when a colt. He says, when a year old. *Mrs. Porteus* says, when a few days old. *Henry* was then eleven or twelve years old. He is now twenty-four. Old *Mr. Porteus* continued to feed and use the horse as his own until the time of his death, which took place soon after, and after his death it remained with the widow, who had received payment for the use of it, and though both she and *Henry* had spoken to plaintiff relative to the old man's transfer to him, they had neither of them told him that the horse belonged to *Henry*.

There was no evidence of any delivery to *Henry*, or of a possession and use by him of the horse, and the only fact testified to as indicating that the old man had ever recognized *Henry* as having any interest in the horse is that he, on one occasion, refused to sell him, assigning as a reason that he had given him to *Henry*. Under this state of facts, and I have taken them from the testimony on the part of the defence, the Judge should have told the jury that no title passed to *Henry*, instead of leaving it to them to establish the validity of the gift to him if they believed his statement and that of *Mrs. Porteus*. *Parsons*, in his work on *Contracts*, p. 201, says: "It is essential to a gift that it goes into effect at once and completely." And again: "Delivery is essential to the validity of a gift," and he cites several cases, and among others that of *Irons v. Smallpiece*, 2 B. & Ald., 551. There two colts were claimed by plaintiff under a verbal gift made to him by his father twelve months before his death. They remained in the possession of his father till his death. Some six months before his death he agreed to furnish to his son what hay he would require at a stipulated price. None was furnished till within three or four days before testator's death. *Abbot*, C. J., said: "I was of opinion that the possession of the colts never having been delivered to the plaintiff, the property had not vested in him by the gift." He goes on to say, in giving judgment: "By the law of *England*, in order to transfer the property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." *Holroyd*, J., said: "I am of the same opinion. In order to change the property by a gift of this description, there must

be a change of possession." *Best*, J., concurred. In *Shower v. Pilck*, 4 Exch., 477, *Alderson*, B., says: "To pass property there must be both a gift and a delivery." In *Winter v. Winter*, 1 B. & S., 997, one of the latest decisions on the subject, the Court seemed to think that the principles had been stated too broadly in these cases, and *Crompton*, J., said: "Actual delivery of a chattel is not necessary. In a gift *inter vivos* it is sufficient that the conduct of the parties shew that the ownership has been changed," and there there has been a change in the possession consequent upon the gift. Adopting the law as laid down by Mr. Justice *Crompton*, there has been no valid gift in this case, for there has been no delivery, no change in the possession consequent upon the gift, and nothing in the conduct of the parties to shew that the ownership had been changed.

Assuming that *Henry Porteus* had no title to the horse, I fail to see anything in the evidence to authorize a Judge to leave it to a jury to say that the plaintiff had sanctioned the transfer to the defendant so as to estop him from claiming in this action, nor was that question in fact submitted to the jury. The evidence on the part of the plaintiff is conclusive on this point, if it is to be believed, and that on the part of the defendant does not amount to a contradiction of it. The plaintiff had stated that after the old man's death he had permitted the sale of the oxen and a cow, part of the stock conveyed to plaintiff with the horse in question, to pay his funeral expenses, and had told the defendant he would be quite safe in buying them, and the defendant admits that it was in reference to this sale that the plaintiff had recognized *Henry's* right to sell. It was not till a year or two after that the defendant obtained the horse without any further reference to the plaintiff, and when he was subsequently taxed with having the plaintiff's horse, he did not rely on any such authority for the purchase, but, on the plaintiff telling him he had a bill of sale from old *Mr. Porteus*, replied: "You say you have papers in your possession to shew that the horse is yours. Shew them to me and I will give him up.

I am of opinion that the defendant failed to adduce any evidence to impeach the plaintiff's title to the horse, and that the rule for a new trial should be made absolute with costs.

## CHAMBERS v. HUNTER.

THE rule against one Judge rescinding an order made by another Judge does not apply to orders which are made absolute in the first instance.

Parties against whom such orders are obtained *ex parte* may apply to have them set aside if irregularly or improperly obtained, especially where they had a right to be heard before the orders were granted.

In taking out a rule for interrogatories, a rule *nisi* should be taken, and not a rule *absolute* in the first instance.

RITCHIE, J., now, (December, 1870,) delivered the judgment of the Court :—

In this case an order *absolute* in the first instance was, on the 19th *January*, 1869, made by Mr. Justice WILKINS, at Chambers, giving leave to plaintiff to deliver interrogatories to defendant, and requiring him to answer within ten days after the delivery of them. On the 26th *January* an order *nisi* was obtained from Mr. Justice WILKINS to set aside the original order and interrogatories. The order *nisi* was made returnable before the presiding Judge at Chambers, and, after argument before Mr. Justice DESBARRES, the presiding Judge at Chambers, it was made absolute with costs. From this order *absolute* the plaintiff has appealed. The order of the 19th *January* was, in my opinion, irregularly obtained, as such an order should have been preceded by a summons or order *nisi*, which plaintiff's attorney should have applied for, instead of an order *absolute* in the first instance. See *Chitty's Archbold*, 1428, and cases cited. See also *Croomes v. Morrison*, 5 E. & B., 984, and *Thol v. Leusk*, 10 Exch., 704.

But it was said that one Judge at Chambers cannot rescind the order of another Judge. That may be true where a Judge, on hearing the parties, or on *summons* or order *nisi*, has made an order *absolute*. In such case the dissatisfied party should appeal to the Court, and the cases cited shew that it is considered improper to make application to another Judge to rescind an order so made. But the rule against one Judge rescinding an order made by another Judge, after hearing both parties, and giving them an opportunity of being heard, does not, I think, apply to orders which are made absolute in the first instance. Parties against whom such rules are obtained *ex parte* may apply to have them set aside if irregularly or improperly obtained, especially where they had a right to be

heard before they were granted. *Chitty's Archbold*, pp. 1592, 1594, 1598. In the case of *Darrington v. Price*, 6 C. B., 218, it was held that a Judge at Chambers had jurisdiction to set aside a rule of Court to change the *venus* obtained on the ordinary affidavit, and *Wilde, C. J.*, said: "As to the power of a Judge at Chambers to set aside a rule of Court, experience shews that the jurisdiction at Chambers is a growing jurisdiction, and that the public are much benefitted by its exercise, many questions of practice being there decided with rapidity, and at little expense to the parties. I do not recollect, indeed, that it has ever been held, in express terms, that a Judge sitting at Chambers has power to control a rule of Court, but when the question arises we must look at the nature of the rule," and the learned Chief Justice referred to the case of *Doe d. Harwood v. Lippincott*, cited in *Chitty*, p. 1032, where it was held that if a party were admitted to defend as landlord whose title was inconsistent with the possession of the tenant, the lessor of the plaintiff might apply to the Court or a Judge at Chambers, and have the rule discharged with costs, and he says the proposition there laid down is founded upon the authority of a very learned Judge, (Mr. Baron Wood,) and one who was extremely unlikely unduly to encroach upon the jurisdiction of the Court." If a Judge at Chambers can so deal with such a rule of Court, surely he must have a right to do so with a Judge's order which has been irregularly obtained *ex parte*.

In this case *Mr. DesBarres* the defendant's attorney, went to the same Judge who had granted the original order for the order *nisi* to set it aside, and the interrogatories under it, for irregularity, who granted it, making it returnable before the presiding Judge at Chambers, and Mr. Justice DESBARRES, being such presiding Judge, having heard the case, made the rule absolute with costs. From that judgment the plaintiff appealed on the following grounds:—

1st. That the same is against law. 2nd. That the application should have been made to and argued before the Judge who granted the order. 3rd. That one, at least, of the interrogatories was not objected to, and the judgment was to set aside all. 4th. That the Judge, in his discretion, could grant the original order *absolute* in the first instance. 5th. That the interrogatories were such as should have been allowed.

Assuming that the plaintiff's rule for interrogatories ought not to have been a rule *absolute* in the first instance, and that it should on that account be set aside, I need say nothing about the interrogatories, as they depend on the validity or invalidity of the order under which they were made, and as I am of opinion that the attorney of the plaintiff should have applied for and taken out a rule *nisi* for interrogatories instead of a rule *absolute*, and that Mr. Justice DESBARRES, under the circumstances of the case, had a right to hear the parties on the rule *nisi* granted by Mr. Justice WILKINS, I am of opinion the appeal should be dismissed with costs.

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### ROPER v. SHANNON.

J. C. died about the year 1802, possessed of a fund amounting to £8638 2s. 4d., which he devised to trustees upon certain trusts in favor of his daughter and others, and, upon failure of such devise, then to his nieces or their lawful issue. The original devise in the will having failed, a rule was passed in the Equity Court, on a suit instituted by the trustees, by which it was ordered that a portion of the fund should be distributed and paid by the trustees, in certain proportions, among the next of kin of the said J. C.

M. W., being entitled as one of the next of kin, with J. S. W., her husband, executed a power of attorney to S., empowering him to receive the money coming to her by virtue of the said will. On the 3rd April, 1808, S. received under said power the sum of \$1927 which, on the same day, was attached in his hands by E. B. on process issued against J. S. W., the husband, as an absent or absconding debtor. On the 23rd February previously, J. S. W. had been adjudicated a bankrupt in England, and a creditor's assignee was appointed. Notice of this was received by S. on May 21st, 1808, but no notice of the bankruptcy had been received by E. B. at the time of the issue of the attachment process. S. was notified by M. W. on July 29th, 1808, that she claimed the fund in question in her own right, and she followed this up by a suit in Equity.

*Held*, on a case prepared, that the creditor's assignee was entitled to the fund as against E. B. the attaching creditor.

*Held* also, that the bankruptcy of J. S. W. determined the power of S. to receive the fund, that it had not been reduced into possession, and that it, therefore, must be treated as if still remaining in the hands of the trustees.

*Held* also, that the creditor's assignee was not entitled to the fund without making provision for the wife, and that the latter, being entitled to the fund as a *chose in action*, was justified in coming into Equity for her protection.

*Held* also, that as J. S. W., the husband, was a bankrupt, and the sum in controversy not large, and M. W., the wife, being without any provision by a settlement made before or at the time of her marriage, the taxable costs being first paid, the balance of the fund should be paid or secured to her for her own benefit.

McCULLY, J., now, (January 7th, 1871.) delivered the judgment of the Court:—

This matter came before the Court on the 28th December, 1870, upon a case prepared, and was argued by McDonald, Q. C., and James Johnstone for Roper, B. G. Gray for E. Binney

and C. B. Bullock for *Mary Whitby*, wife of *James Smith Whitby*.

The facts of the case, briefly set out, are that one *Joseph Creighton*, late of *Halifax*, deceased, about the year 1862 died possessed of a fund amounting, as appears, to the sum of £8638 2s. 4d., invested in three per cent consols, which he devised to *L. Hartshorne* and the *Rev. James Stewart*, upon certain trusts in favor of testator's daughter and others, and in failure of said devises, then, in certain contingencies, to testator's nieces or their lawful issue. This fund was withdrawn from *England* and invested in *Nova Scotia* by the trustees. Upon a suit instituted in Equity by the trustees for direction a case was prepared, and agreed upon by the parties claiming to be interested in the fund, and heard and adjudicated upon by this Court, and in *January*, 1867, a rule passed by which it was ordered that the portion of the fund out of which this claim arises, "should be distributed and paid by the trustees in certain proportions among the next of kin of the said *Joseph Creighton*, deceased, the original devises in said will having failed, as by the case appears. *Mary Whitby*, wife of *J. S. Whitby*, (without any marriage settlement) was, at the date of the distribution, entitled, as one of the next of kin, of *Creighton*.

In the year 1863, *June* 24th, *Mary Whitby* and *J. S. Whitby*, together with one *Lucy Parker*, another of the next of kin, joined in a power appointing *S. L. Shannon, Esq.*, their attorney, to receive any money coming to them under and by virtue of said will, and it is set forth that on the 3rd day of *April*, A. D. 1868, said *Shannon* received under said power of attorney the sum of \$1927, being the fund now in controversy, and being the proportion coming to *Mary Whitby* as one of the next of kin aforesaid. On the 3rd *April*, 1868, the same day, this fund was attached in *Shannon's* hands by *Edward Binney*, under process issued at his suit against *J. Smith Whitby*, as an absent or absconding debtor, and *Shannon* was summoned as agent. *Shannon* subsequently filed the usual declaration required by law, acknowledging the receipt of \$1928 as collected under the power of attorney, and, on the 13th *April*, 1869, *Binney* recovered a judgment against *Whitby* for \$8032.37, debt and costs. On the 23rd *February*,

1868, *Whitby* was adjudicated a bankrupt in *England*, and notice of said adjudication and appointment of creditor's assignee (*Roper*) were, on the 21st *May*, 1868, received by *Shannon*. But no notice of the bankruptcy had been received by *Binney*, when his process of attachment issued, nor probably till about the date when received by *Shannon*. On the 11th *December*, 1868, *Roper*, assignee of *Whitby*, brought an action of assumpsit against *Shannon* to recover the amount of \$1928 in his hands, to which several pleas were pleaded, among others that the Bankruptcy Laws of *England* were not in force in *Nova Scotia*. On the 29th *July*, 1868, *Mary Whitby* notified *Shannon* that she claimed the funds in question in her own right, and forbade him to pay it to any person but herself. On the 2nd *December*, 1868, she followed up her demand by a suit in Equity, by *H. Hartshorne* as her next friend, and, in the case submitted for adjudication it is agreed by the three parties claimants, that without plea to this latter suit, her rights shall also be entertained and adjudicated upon in my judgment to be delivered.

The question to be decided is, how the fund still in the hands of *Shannon* is to be disposed of. Which of the claimants,—*Roper* as assignee, *Binney* as attaching creditor, or *Mary Whitby*, wife of *J. S. Whitby*, as next of kin to *Creighton*, is entitled, and, if, under any, under what modifications? On the part of *Roper* it is contended that the fund passed to him on the 23rd day of *February*, 1868, by operation of law, as assignee in bankruptcy of the estate and effects of *J. Smith Whitby*, divested of all rights or equities of *Mary Whitby*. On the part of *Binney* it is contended that the process of attachment served upon *Shannon* on the 3rd *April*, by virtue of chapter 141 of the *Revised Statutes* of *Nova Scotia*, gave him such a claim, or priority, as entitles him to the fund. And, on the part of *Mary Whitby* it is contended that the fund was never reduced to the possession of *J. Smith Whitby*, her husband, before bankruptcy, so as to exclude her claim as next of kin, and her equities to be properly provided for now, while the fund is in litigation, notwithstanding the adjudication of bankruptcy, and the absconding debtor process.

Without expressing any opinion as to what relief a bankrupt, regularly adjudicated to be such in *England*, may be



entitled to in this Province, or what effect such an adjudication has upon the claims of creditors domiciled here, it is noticeable that by the 70th section of chapter 134, 24 & 25 Vic., *Imperial Acts*, if parties with intent to defeat or delay creditors "being out of the realm, shall, with such intent, remain abroad," they clearly commit acts of bankruptcy. And, in the 75th section of the same Act, "Her Majesty's dominions, colonies, or dependencies," are specially named as places where, if a debtor file or have filed against him a petition in any Court having jurisdiction for the relief of insolvent debtors, &c., the adjudication of an act of insolvency or bankruptcy on such petition, shall constitute an act of bankruptcy to be proceeded upon after notice in the *London Gazette*, for two months, as if committed in *England*. Again, in the definition of the word "property," section 229, and the meaning it is intended to bear, it shall mean and include "all the real and personal estate and effects of the petitioner or bankrupt within this realm and abroad." But it is not necessary for the purpose of settling this controversy to invoke the aid of enactments contained in the *Imperial Act* of 1861, or of the *Consolidated Bankruptcy Act* of 1869. *Story*, in his *Conflict of Laws*, secs. 403 to 410, long before the passing of these Acts, discussed the subject of assignments under bankruptcy laws and attachments, and, there, clearly propounds the doctrines held and settled in the *English* as well as in the *United States Courts*. "The Courts of *England*," he observes, "and of the *United States* have arrived at opposite conclusions. The Courts of the former country uniformly maintain the doctrine of the universal operation of such assignments." He proceeds; "'One thing,' said Lord *Eldon*, upon appeal from the decision of the Court of Sessions in *Scotland*, which decision was affirmed in the House of Lords, the question having arisen whether the assignee or the attaching creditor was entitled to priority, this depending upon the question whether an English Commission of Bankruptcy passed to the assignees the title to property or debts, locally situate or due in *Scotland*. 'One thing,' said the Lord Chancellor, 'is quite clear,—that there is not in any book any *dictum* or authority that would authorise me to deny, at least in this place, that an *English Commission* passes, with respect to the bankrupt

and his creditors in *England*, the personal property he has in *Scotland*, or in any foreign country.'"

This disposes of the controversy as between *Binney* under his attachment, and *Roper* as assignee of *Whitby*. The question remaining is, what are the rights of *Mary Whitby*, wife of the bankrupt and one of the next of kin to *Creighton*, as regards the fund. It is contended on her behalf, first, that the possession of the fund by *Shannon* was not taken under the power, executed by her and her husband. It was a power only to receive funds under *Creighton's* will, and contained authority to receive them under the statute of distribution, or otherwise as a legacy or bequest, the next of kin *as such*, not being referred to in said will. Second; if taken, legally, under the power, that his possession did not enure to the husband, the bankrupt, but to the husband and wife, and was, therefore, no reduction to possession by the husband of the wife's estate. Third; it was further contended that *Whitby's* bankruptcy cancelled the power of attorney. The bankruptcy occurring on the 28th *February*, and *Shannon* having received the fund on the 3rd *April*, 1868, some thirty-four days subsequent.

In *Kent's Com.*, vol. 2, (star paging.) 645, it is laid down broadly, "that the agent's power is determined by the bankruptcy of his principal," but mere formal acts passing no interest are exceptions, and the authorities cited go to show that an agent cannot, after the bankruptcy, have any personal advantage under such a power. If this be so, it sustains the position that this fund, at the date of the bankruptcy, being in the hands of the trustees, for all purposes connected with *Mary Whitby's* rights, the present controversy should be disposed of, and the fund treated as if still remaining in their hands.

In this view of the case I am not required to examine so minutely the power of attorney executed by the bankrupt and his wife, but it will be found on careful perusal that it was drawn in contemplation of a devise, supposed to be effective, in *Creighton's* will, for bequeathing a beneficial interest to *Mary Whitby*, but which proved to have been a misapprehension. I find no authority to *Shannon* to receive funds for the benefit of the parties executing the power, except as

devises or bequests under the will. Nor need I, now, for obvious reasons, further remark on the second point taken by *Mrs. Whitby's* counsel, for *Shannon's* receipt to the trustees would have been no discharge in a suit by the assignee against the trustees to recover this fund. In *Atkinson v. Dickson*, *Law Times* for *September*, 1870, a married woman being absolutely entitled to a share of a residuary estate, of which her husband was one of the trustees, a cheque for the amount was drawn by the *acting trustee*, who was also the solicitor of the husband, payable to the lady or bearer, and the proceeds of the cheque were subsequently invested in the names of two persons for her. *Held*, that the fund was not reduced into possession by the husband. There being, therefore, no reduction of this fund to possession by the husband before his bankruptcy, and see further on this point *Roper on Husband and Wife*, vol. 1, p. 208; *Williams on Executors*, 765, and 13 *Simons*, 309, the next question is, what relief, if any, is *Mary Whitby* entitled to under the facts set forth in the case submitted? By her writ sued out of the Equity side of the Court by *H. Hartshorne*, her next friend, she claims the entire fund from *Shannon*. The parties having all agreed that her rights must rest upon the facts as set forth in the case adjudicated upon, I think this Court is now fully possessed of the requisite jurisdiction and, therefore, warranted in considering the case upon the merits as they appear by the documents and undisputed facts. The writ is certainly not very artificially prepared for the object sought, but rather as characterising the claims and the jurisdiction invoked, than as raising specific issues for, whatever *Mary Whitby's* rights are, it is consented to by all that they shall be accorded to her without any plea or issue joined on her suit.

This fund of \$1927 was a *chose in action*, and if not reduced into possession by the husband during his life must, but for the bankruptcy, have survived to the wife had she outlived him. And with respect to *chooses in action*, it is laid down in *Mitford v. Mitford*, 9 *Ves.*, 87, "They are not assignable at law, consequently the husband's assignment cannot prevent them legally surviving to the wife." Further on, at page 100, "It has long been settled that assignees under a Commission of Bankruptcy, coming into a Court of Equity to

reduce the interest of the wife into possession, are bound to make such a settlement as the husband would in the same case have been compelled to make." Again, "If the assignment put the assignees in possession, it would completely extinguish all the claims of the wife, as the possession of the husband certainly does." And again, "The Court considers the assignment as doing nothing more than to place the assignees in the room of the husband." See also *Hornsby v. Lee*, 2 Mad., 20. As to what a wife's *chooses in action* are, see *Roper on Husband and Wife*, vol. 1, p. 224. They are debts due to her, on bond, or otherwise, money in the funds, legacies, trust funds, and other property recoverable by action or suit."

As to the question of *Mary Whitby*, the wife, coming to a Court of Equity actively to assert her rights, whatever was formerly held upon that subject, since the decision of *Lady Elibank v. Montilieu*, *Leading Cases in Equity*, 424, and notes, (5 Ves., 737,) there is now no longer room for doubt on that point. In 11 *Simons' Reports*, 570, V. C. *Shadwick* says, "I take it to be perfectly settled law, that where a wife is entitled to a *chose in action* which consists of a principal sum, and not merely income, she may file a bill against her husband and the trustee for a settlement." See, also, 5 *Mylne & Craig*, 105, to the same effect, and *Harrison v. Keating*, 4 Hare, 9., Am. note, 4, citing 5 *Johnson's Ch. Prac.*, 473; see, also, *Williams' Eq. Jurisp.*, 637 and cases. In *Brown v. Clarke*, 3 Ves., 166, Lord *Alvanly* said; "The assignees of the husband must make a provision for the wife before they can call it (the fund) out of this Court." In 3 *Vesey*, 421, Lord *Roslyn* directed a provision for the wife against the assignees of the husband on the same principle. *Freeman v. Fairlie*, 11 Jur., 447, is cited in *Leading Cases in Equity*, vol. 1, p. 451, to show that a sum of money, rent of real estate (not equitable), to which the husband was entitled, *jure mariti*, being paid into Court by an agent, it was held that the assignee was not entitled, without making a settlement upon the wife.

The last inquiry imposed upon the Court in this case is to fix the amount or proportion of the fund to which *Mrs. Whitby*, under the peculiar circumstances of the case, is entitled. The husband is a bankrupt and insolvent, and the wife has no provision or settlement made for her before, at, or

since marriage. It is not known what her position in life is or has been, and the fund is not large. After looking into the cases cited on this point; 17 *Beavan*, 482; 16 *Beavan*, 249; 1 *Drewry*, 326; 1 *Drewry & Smale*, 80; 19 *Beavan*, 347; and 22 *Beavan*, 588. I am of opinion that, the taxable costs of this litigation being first paid out of the fund, the balance, with interest thereon accrued, should be paid or secured for the benefit of *Mary Whitby*, wife of *J. Smith Whitby*.

Such is the conclusion to which I am conducted upon a careful examination of the principles enunciated in the cases that bear upon the subject in controversy. The modern decisions in Equity, it will be observed, are characterised by a progressive liberality and regard for the rights of married women, and, as a crowning effort, the *British* Parliament has, during its last session, passed an act, entitled the "*Married Woman's Property Act*," with a perusal of which I have been favored, which secures for married women in *England* advantages with regard to private earnings and property coming to them in their own right, which they never before enjoyed, and which I hope ere long to see enacted in our own Provincial Legislature.

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#### IN RE ESTATE OF LAWLOR.

THE power of the Equity Court over the real estate of infants in this Province is more extensive than any such power which has ever been exercised in England.

If it be shown that by the disposal of the property the interest of the infant will be substantially promoted on account of any portion of the property being exposed to waste or dilapidation or being wholly unproductive or for any other reasonable cause, the Court has a discretionary power to order a sale.

Where the whole property yielded an income of only \$100, and the infant's undivided share, upon a sale, would produce four or five times as much as their share of the rental,

*Held*, that the discretionary power of the Court was wisely exercised.

*Held* also, that the discretionary power of the Court to order a sale was not determined by the appointment of a guardian, and that where the guardian, who was the mother of the infants, was opposed to the sale, and neglected or refused to find security as required by *Revised Statutes*, (3rd Series,) chapter 124, section 51, the Court had power to remove such guardian, and substitute in her stead a suitable person as next friend to file the necessary bond and effect the sale.

SIR W. YOUNG, C. J., now, (January 7th, 1871,) delivered the judgment of the Court:—

This is an appeal from an order of His Lordship the Judge in Equity, of 23rd November 1869, for the sale of the share of

two infants, originally estimated at one undivided seventh, but, afterwards appearing to be one undivided eighth part of *Lawlor's Island*, lying in the harbor of *Halifax*, and for which the Dominion Government were willing to give £2000, to be used as a Quarantine Station. The sale was ordered under the *Revised Statutes*, (3rd Series,) chapter 124, sections 51 and 55, and the order having been carried out, notwithstanding the appeal, the title has passed, and the infants' share, less the costs incident thereto, has been deposited in the Savings' Bank, waiting a further and more profitable investment at six per cent. The owners of all the other shares, and the mother of the two infants, in the first instance, approved of the sale, which was reported by the Master, and appeared to the Court to be for the substantial interest of the infants, but the mother, thinking that a higher price should have been given, refused her consent to the sale, and, having been appointed guardian under an order of 12th *July*, 1869, neglected or refused to file a bond with sureties, as required by section 51 and by said order, and disputes the authority of the Equity Judge to cancel such order and to substitute and appoint, in her room, *Mr. Daly*, by the order of 23rd *November*, 1869, as the next friend of the infants, to file the necessary bond and effect the sale.

The question, then, turns upon the authority of the Equity Court to order the sale of the infants' share, under these circumstances, and against the will of the mother. It must be at once conceded that the power over the real estate of infants, conferred by chapter 124, which was first passed in the *Chancery Abolition Act* of 1855, far exceeds any power that has ever been exercised in *England*. The Imperial Act, 1 *William IV.*, chapter 65, section 17, is confined to the leasing of infants' estates under certain circumstances, and, under the decision in 15 *Simon*; 445, extends only to estates of which they are seised in possession. In *Calvert v. Godfrey*, 6 *Beav.*, 107, decided in 1843, Lord *Langdale* said: "The Court may order real estate vested in infants to be sold to satisfy the demands of creditors, or to give to *certain que trust* the benefit to which they are entitled, but it has no authority to convert the real estate of infants into personalty, or to sell the real estate vested in an infant, upon the notion that the conversion would be beneficial to the infant himself, or to himself and others. This restriction,

however, was often felt to be most injurious to the infant, and it was, occasionally, sought to be evaded. In *Newton v. Lucas*, decided in 1846, where three infants were interested, in remainder, in some dilapidated property, vested in trustees, the Court, after ascertaining, by means of reference to a Master, that it would be for their benefit, ordered not a sale, which, if legal, would have been much more to the purpose, but the granting of a repairing lease for a term of fifty years. Yet even of this the Master of the Rolls, in 10 *Beav.*, 544, disapproved.

The origin of our act, then, as of the *New Brunswick Act* of 1854, is to be found, not in *English*, but in *American* legislation, the progress of which is traced in a note to the *American* edition of *Adams on Equity*, 285. In most of the States there are now statutes which authorize the sale of the infant's estate on application by the guardian to the proper Court, when it is necessary or proper for the infant's benefit. By the *Revised Statutes of Massachusetts*, edition of 1861, chapter 102, sections 26 and 27, founded on the act of 1829, the sale of the real estate of a ward, or minor, is authorized when it appears, after full examination, on oath, that it would be for the benefit of the ward or minor that his real estate, or any part thereof be sold, and the proceeds shall be put out at interest, or invested in some productive stock to his use. By the *Revised Statutes of New York*, edition of 1846, vol. 2, pp. 257, 258, on which our act seems to have been framed, the enactment is in the words of our section 51, substituting for the words, "or for any other reasonable cause," the *New York* words, "or for any other peculiar reasons or circumstances," which appear to me to have the same meaning. In *New York*, too, the jurisdiction of the Court in such sales is considered to be wholly derived from the statute, and not to extend to cases not there provided for. Undoubtedly this is the true principle, and no sale that does not come within the terms of section 51 could be upheld. Although these terms are comprehensive, I should have some doubt whether the very large price, which it is said it would be unwise to reject, as alleged in *Mrs. Lawlor's* petition would be sufficient ground for a sale. The grounds subsequently found, and on which the Court acted, were far more conclusive. If it be shewn that by the disposal of the

property the interest of the infants will be substantially promoted on account of any part of the property being exposed to waste or dilapidation, or being wholly unproductive, or for any other reasonable cause, (words as ample as could well be used,) the act applies, and the Court has the discretionary power which, as we think, it has wisely exercised in this instance. The fact that the whole island yielded an income of only \$100, and that the infants' undivided share, upon a sale, would produce four or five times as much as their share of the rental naturally influenced the judgment, both of the Master and the Court.

The questions raised at the argument as to the regularity of the proceedings remain to be considered. Section 51 provides that the infant may, by his next friend or guardian, petition the Court for an order to sell. Here there was no guardian, and the mother, being the next friend, petitions the Court in her own name, asking that a suitable person should be appointed as a guardian to her said infant children, to convey their interest, and participate in the advantages of the sale. This is, no doubt, a departure from the form strictly required, but of too technical a nature, as we think, to affect the title. The mother was appointed guardian by the order of the 12th *July*, 1869, not a general guardian, as if she had been appointed by the Judge of Probate under the *Revised Statutes*, chapter 121, but in the exercise of the Chancery jurisdiction conferred by chapter 124, section 4. *Story's Equity Jurisprudence*, sec. 1338. And, by the same order, she was required, before making a conveyance of the land, to file a bond, with securities in the sum of \$1000 for the protection of the infants, as in section 51. This she did not do, and what consequences were to follow? Whatever question may be raised as to testamentary or statute guardians, there is no doubt that the Court of Chancery has power to remove guardians appointed by its own authority, wherever sufficient cause can be shewn for such a purpose. *Foster v. Denny*, 2 Chan. Cases, 238; *Story's Eq. Jur.*, 1330. Suppose a stranger had been appointed who had been unable or unwilling to find security, was the sale to stop, and the interests of the infants to be sacrificed? And if a stranger could be removed, why not the mother, for sufficient cause? The argument pressed on us was that the mother, being once



appointed, no sale could be legally had without her consent, that the discretion was, in fact, transferred from the Court to the mother. None of the cases, however, from 1 *Peers Williams*, 205 ; 5 *Maddock*, 77 ; 4 *Bro. C. C.*, 355, nor any other that I can find sustain this position, which, as we think, is quite opposed to general principles, and to the wholesome and controlling power of the Court.

The appeal, therefore, is dismissed with costs.

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### WILLIAMS ET AL. v. MYERS.

A DEVISE that executors should sell land, investing them with a power to sell, but conveying no interest, will not enable them to maintain ejectment. It can make no difference that the power is to execute proper conveyances as well as to sell.

The law requires strict proof from the party who sets up alienage as against title.

*Semble*, that as long as a sufficient estate remains vested in an alien he may maintain ejectment.

*Quære*, per WILKINS, J., as to an alien devisee in trust to sell.

*Per JOHNSTON, E. J.*—It is not competent to a party who goes in under a contract to purchase to avail himself of the defence of alienage.

SIR W. YOUNG, C. J., now, (January 7th, 1871,) delivered the judgment of the Court :—

This is an action of ejectment for 160 acres of land at *Guyborough*, tried before my brother WILKINS so far back as *July*, 1862. A verdict was found for the defendant and a rule *nisi* granted for a new trial, which, as I see by the papers on file, was discharged in *July*, 1864 ; but this last rule having been cancelled, I believe, by consent, the case came up for argument before us for the first time in the last Term. The land is part of the *Hallowell* grant of 20,000 acres, which passed in 1765 and was devised by the grantee in 1796 to his son-in-law, Chief Justice *Elmsly*, of *Canada*, and his two sons, *Benjamin* (afterwards Admiral) *Hallowell*, and *Ward Nicholas Boylston*, who probably assumed that name on his marriage. The Admiral and Mr. *Elmsly* and his wife, by deeds produced at the trial, conveyed their respective interests to Mr. *Boylston*, who resided and died in *Massachusetts*, and was alleged by the defendant to be an alien. If so, he was incapable of holding and devising land, this case coming within the third section of

our statute, *Revised Statutes*, (3rd Series), chapter 34, and the common law, therefore, being in force.

Numerous exceptions were taken at the trial at every step of the proof, all of which the Judge reserved, and finally told the jury to find for the defendant if they were satisfied that *Boylston*, or any other through whom the plaintiffs claimed, were not subjects of the *British* Crown. The jury, therefore, in finding for the defendant, found, in fact, that *Boylston* was an alien, and there are many circumstances that predisposed both Judge and jury to that conclusion; but I doubt very much if the evidence is sufficiently strong to sustain it. The father, one of the sons at all events, and the son-in-law were *British* subjects. In the deed to *Boylston* from the *Elmslys*, in 1801, he is described as being then a merchant of the City of *London*. His subsequent residence in *Massachusetts*, where he seems to have occupied a prominent position, and the tone of his opinions, as evidenced by his will, are not of themselves enough to make him an *American* citizen, and the only tittle of evidence in the whole case, that of *Chaffin*, is subject to grave objection. It came out in cross-examination, and was not excepted to, else it would not, in all probability, have appeared upon the minutes. He said: "I knew, personally, *Ward N. Boylston*. He owned real estate in *Massachusetts*. He is dead. The widow of the son of old *Boylston* told me that the elder *Boylston* was born in *Boston*. He inherited the land of his uncle, a citizen of the *United States*, situate in *Massachusetts*. This I learn from the will. Old *Boylston* left a son, who is dead." Now the declaration of the widow was not evidence unless she was shewn to be deceased, and it by no means follows that the son of a *British* subject, though born in *Boston*, (and the truth, here, may have been, and probably was before 1783,) is, therefore, an alien. *Salter v. Hughes*, 1 Old-right, 409; 2 *B. & C.*, 779. We must recollect that this objection is not favored in law. *Sir Matthew Hale* said, in 1 Vent. Reps., 427, that the law was very gentle in the construction of the disability of alienism, and rather contracted than extended its severity. The law, therefore, requires strict proof from the party who sets it up, as against title, and the proof here, as I cannot but think, is rather inferential than positive. On this point I would feel much difficulty in sustaining the verdict.

*Boylston*, by his will, made in 1826, devised his *Nova Scotia* land to his brother *Sir Benjamin Hallowell*, and his sister *Mrs. Elmsly*, and devised to his executors all his estates, both real and personal, not otherwise herein, (that is, in the will,) absolutely and specifically devised and bequeathed. By his first codicil he devises further lands in *Nova Scotia*, of which he had taken a conveyance, to the same brother and sister. By his second codicil he devises all his *Nova Scotia* lands to his sister, she paying £200 stg. to the brother; and, by his third codicil, he revokes that devise and, instead of the same, authorises and empowers the executors of his will to sell and execute proper conveyances of all the said lands, and, out of the proceeds of the sale, he bequeathes to his sister £150 stg. and to his brother £100 stg. The will contains special provisions for the appointment and substitution of trustees. These provisions, when inserted in the will, were not meant to extend, and did not extend, to the *Nova Scotia* lands, which were then absolutely and specifically devised to other parties than the executors, and it is a main question, in this case, whether, by any known rule of construction, they could be made to extend to the power and authority, which is not a devise, in the third codicil; for upon that the right of the plaintiffs to recover in this action principally depends.

The executors, *John Quincy Adams*, *Nathaniel Curtis*, and the wife of the testator, *Alicia Boylston*, though they gave a power to *Mr. Cutler*, 31st October, 1828, (*Mr. Adams* executing by an attorney,) conveyed none of the *Nova Scotia* lands, but a sale was had under their authority in 1829, at which the defendant purchased the lot in question for £23, and entered in fact under them. It was argued that having so entered, he could not dispute their title, and the numerous cases in *Harrison's Digest*, 3695, and *Cole on Ejectment*, 213, were referred to in support of that position. Most of these are between landlord and tenant, or where a man attempts to derogate his own grant, but, giving the doctrine of estoppel its full scope, we must recollect that the executors are not the plaintiffs here, but trustees appointed in their room.

Mr. Justice WILKINS, whose judgment I have had the opportunity of seeing, has pointed out some defects in the appointment of these trustees, and the proof of it, which I

shall not go into, but will only add that the appointment of *George F. Williams* is by the Judge of Probate for the County of *Suffolk*, while the will requires it to be made, as the other two were, by the Judge of Probate for the County of *Norfolk*, which, as I gather from the evidence, still has its own Judge and Probate Court.

The more material inquiry is, in whom was the fee, carrying the right to recover in ejectment. It was not in the executors under the will, because the *Nova Scotia* lands were expressly excluded. Was it in them under the third codicil, which, I have observed, contains no devise, but, simply, a power to sell and execute conveyances? Now this is rather a nice question. Had there been a devise, without words of inheritance, the case of *Shaw v. Weigh*, 2 Strange, 798, shows that the law will supply them to carry out the intent of the devisor. The high authority of Lord *Hardwick*, which has been followed by *Mr. Lewin* and others of the text writers, goes further, and it has been assumed as clear law that a trust to sell confers a fee simple, as indispensable to the execution of the trust; *Lewin on Trustees*, 164, and the case of *Bagshaw v. Spenser*, 1 Ves., 142, is cited in proof, where it is said that a trust to sell for the payment of debts and legacies carries a fee by construction, and that the trustees may sell the inheritance by virtue of their estate, not of their power. They must have a fee, it is said in the whole, otherwise, as it is uncertain what they may sell, no purchaser would be safe. Now there is no doubt that the executors, under this codicil, could have sold the inheritance, but it does not follow that the fee was in them, or would go to the heir of the surviving executor, and still less to an administrator with the will annexed. The cases are reviewed by *Mr. Sugden* in his treatise on *Powers*, 8th ed., 111, and I shall refer to them shortly. As far back as the reign of *Henry VI.*, it was laid down, in a case in the *Year Books*, that if one devise that his executors shall sell his lands, and die seised, his heir is in by descent, and, consequently, that his executors have only a power, but that if one devise his land to his executors, then the freehold passes by them to the devise. This distinction is mentioned by Judge *Doddridge* as a common difference. (*Latch*, 43.) So *Littleton* puts the case (sec. 169) of a man

devising that his executors may sell his estate, which he treats as a mere power, passing no interest; and therewith *Coke*, in his comment, agrees. The modern cases of *Yates v. Compton*, 2 P. Wms., 308, and *Lancaster v. Thornton*, 2 Burr., 1027, are to the same effect, and overrule the *dictum* of Chief Baron *Hale*, (Hard., 419,) and the opinion of *Mr. Hargrave*, (note to *Co. Litt.*, 113 a,) so that we cannot but acquiesce in *Mr. Sugden's* conclusion, that from these cases, it would seem, that a devise, that the executors should sell the land,—or that land should be sold by the executors, will give them simply an authority, it will invest them with a power only, and not give them an interest.

It can make no difference in this case that the injunction or power is to execute proper conveyances as well as to sell. I ought to say that I would have had no difficulty in holding that the plaintiffs, though aliens, and not coming within our Act of 1854, chap. 19, sec. 3, could have maintained ejectment. There is no decided case, says *Cole*, in his Treatise, 580, in which it has been decided that ejectment cannot be maintained by an alien; that is, in his own right. Upon principle, it would seem that so long as a sufficient estate remains vested in the alien, *exemplu gratia*, until office found, he may maintain ejectment. *A fortiori*, he may maintain it *en autre droit*, as executor, administrator, head of a corporation, or the like; *Cro. Car.*, 8. The difficulty, here, is that there was no estate vested in the executors, or in the plaintiffs substituted for them, and, as, in the view I take, they could not possibly recover, it would be in vain to send the case down to a second trial. The verdict for the defendant, therefore, must stand.

WILKINS, J.—It will conduce, I think, to the elucidation of the question before us, if I state shortly the leading facts. As far back as the year 1829 the executors of the will of *Boyleston*, a testator who died in the State of *Massachusetts*, as such executors by their attorney, *Cutler*, sold at auction certain lands at *Guyborough*, and among them, "lot 34," to this defendant. *Cutler* made known to him his authority, founded on the letter of attorney in proof. It forbade him to warrant the title, it empowered him to eject unlawful intruders, to

compromise for back rents, to take possession and to convey. The defendant then owned the lot adjoining lot 34. The terms of sale to him were £23, one quarter in cash, the remainder to be secured by note with interest. Defendant paid *Cutler* £4 10s. on account. A note was prepared, but from inadvertence, was not signed. *Cutler* gave a receipt for the £4 10s. Whether defendant was by squatting or otherwise in actual possession at the time of the sale, or whether he then for the first time took possession, is left perfectly uncertain under the evidence. It is inferrible from the language of the power that there were, when it was executed, intruders on the land, and obviously the defendant may have been one of those. It was, of course, for the plaintiffs in ejectment to have removed by positive evidence all uncertainty on the point, if they meant to insist on a doctrine so stringent as estoppel. *Cole* says, p. 257, "The fact of the defendant being tenant in possession, of itself amounts to *prima facie* proof that he is seized in fee, or otherwise entitled to the possession until the contrary be proved." Again at page 215; "A title by estoppel is established by proof of the lease, or agreement, or licence, and of the entry or possession by virtue thereof." *Doe d. Bord v. Burton*, 16 Q. B., 806, is to the precise point "that in ejectment it is not the contract, but the letting into possession under it, that creates the estoppel." In *Knight v. Cox*, 18 C. B., 649, *Creswell*, J., says; "We have no right to assume against the defendant those facts which are necessary to sustain the action." Estoppel, in respect of anything that took place between the defendant and *Cutler* is, indeed, entirely beside the question, from this obvious consideration, viz., that, even assuming that defendant first took possession from *Cutler*, he took it from him as the agent of principals who were dead long before the demand of possession made on the defendant. Then *Cutler's* power was at an end. So that the question was then as it is now, "Who at the time of the demand legally represented the executors of *Boylston*, from whom the defendant bought and received possession?" To them, and to them alone, on the assumption stated, would defendant have been bound to deliver up the possession. In whatever way he originally entered, he was in possession under a contract, and ejectment would not lie against him

until possession was legally demanded. It has never been legally demanded, for the only demand in proof did not proceed from those with whom, or with the legal privies of whom he contracted. His contract was with the executors of *Boylston*, "the demand was made by *Charles Chaffin*, as attorney of these plaintiffs, described by *Chaffin* as trustees under the will of *Boylston*. The written demand contains no intimation to the defendant of a documentary title being then or previously executed, and ready for delivery on his payment of the balance of the purchase money with interest. There is no evidence, indeed, to show that this defendant would not have paid that balance, and accepted a title such as it was, if a conveyance had been prepared, and tendered to him. *Cutler* uttered not a syllable to that effect, and all that *Chaffin* says on the subject is; "I conferred with defendant, and told him I was there on behalf of trustees to close up the *Boylston* estate, understanding he had bought lot 34 and had not paid for it. He doubted my authority and that of *Cutler*, (it will be shown presently what good grounds he had for doing so). I offered to complete his title," but, as we shall see, he was not then prepared to do so. *Chaffin* says he was an agent of these plaintiffs under the power in proof. The following circumstances apparent on the face of this power are very noticeable. It is in terms from "the trustees under the last will and testament of *Boylston*." It empowers *Chaffin* to deliver quit claim deeds of whatever interest said trustees may have in the lands named. It contains this clause; "The acts of said *Chaffin* under this power are to be conducted in pursuance of his agreement with said trustees, and without expense to them, language not unlikely to excite suspicion and alarm in the mind of an uneducated *Guyborough* farmer! The only interview that *Chaffin* had with the defendant was in 1857. The demand of possession was made on the 15th *June*, 1860, the action was commenced on the next day, and the power of attorney to *Chaffin* was not registered until the 6th of *December* following, that is not till six months afterwards. On view of the circumstances under which defendant had agreed with the executors to purchase this lot, and of all the subsequent facts that are before us, I cannot think it unreasonable or inequitable in this defendant to have hesi-

tated to deliver up possession to *Chaffin*. On the alienage point, from the view I take of this case, it is unnecessary for me to go into detail. It is of course unquestionable that an alien may take, sell and devise, subject to the right of the Crown; but that is not the sole question here, as this defendant contracted to purchase. The will was introduced by the plaintiffs, and from the manner in which the testator, *Boylston*, speaks, and speaks with enthusiasm of the *United States of America* as "our country," and from many other circumstances in the will, it must be *prima facie* taken that he was an alien. The *United States* was clearly the country of his adoption and his affection when he made his will, nevertheless it may be that he was born a British subject, and never lost the privileges which attach to that *status*. These plaintiffs, however, are all aliens, and it appears to me not unreasonable to hold that those who would compel the defendant to perform his contract or eject him from the land, (it not being proved that he took possession from them, or from those under whom they claim,) should be prepared to show a title not clouded by a right in the Crown, to divest a purchaser of the possession. No authority can more strikingly illustrate this than *Fish v. Klein*, 2 Mer., 431, before *Sir William Grant*. It involves a strong doubt as to the validity, if it does not recognize the invalidity of a conveyance by an alien devisee in trust to sell. That assumed invalidity was deemed so important that in that case a private act of Parliament was obtained, (though ineffectually,) to remedy it. *Lewin*, in his work on *Trusts*, p. 32, says, that an alien cannot effectually be a trustee in respect of freeholds, chattels real, citing for the position this very last case referred to. I have been unable to find, and I do not think there can be found, an adjudicated case which decides that an alien friend can sue for land in a British Court. There are *dicta* to the express point that he cannot maintain such action by very great lawyers, in modern as well as ancient times. See *Co. Litt.*, 129 b; *B. Dyer*, fo. 2, pl. 8; *Roscoe on Real Actions*, 6. The Vice Chancellor asserts the position *obiter*, it is true, but without qualification, in *Ritson v. Stordy*, 3 Sm. & Giff., 23. The Master of the Rolls, in *Barrow v. Wadkin*, 24 Beav., 25. reviewing that case, does, indeed, dissent from the decision. but he leaves the position mentioned absolutely unquestioned.



I proceed now to consider the points raised at the argument. A point was taken by the defendant's counsel which, if it prevail, will in effect establish the verdict, and make it unnecessary for us to consider the plaintiffs' other arguments in support of the rule. It was insisted that this action could not be maintained, because the evidence shows that these plaintiffs have no title to the land sought to be recovered. It was contended that, even supposing the documents proved, (as I think they were,) and the alien question out of the case, still the plaintiffs are unconnected with those who were *Cutler's* principals at the time of the sale, and at the time the suit commenced had no title deduced from the will of *Boylston*. This contention seems to me to be entirely supported by the facts before us. Before investigating them it must be noticed that as the three nominees of the testator *Boylston* were alike trustees and executors, their right to sell the land in question whilst they lived was indisputable. They, as executors, directed to sell, had, in order to a sale, necessarily a legal fee simple. The will shows, that while all the other lands disposed of by it were expressly devised to the three trustees, and to those who were to supply their places in case of vacancy, the land in question was not devised to them, and the provision made for the event of vacancies in the trust respecting the estate so devised, did not relate to the *Nova Scotia* lands. These last were, in the final disposition of them made by the testator, directed to be sold his executors. These plaintiffs, as we shall see, are not presented to us in that character, but as trustees, and by virtue of decrees of two several Courts of Probate constituting them such in express terms. There is, as I shall presently show, an essential difference in character between "executors" and "trustees." But looking at this will, we find that after the death of the testator's nominees, it would become important to determine who were trustees strictly, and who were executors strictly, since there are many provisions which could be performed by one of the two classes alone. Among others, note the visitatorial power over charities given to the executors, and also the case of annuities with payment, of which the executors are charged, while they alone could take receipts that would discharge the estate. That this visitatorial power was

designed by the testator to be given to the executors as such, is removed from all doubt by the fact that it is in terms given to "the survivors of the executors." He could not have intended trustees, because as regards those he excludes by his express and positive provisions, survivor or survivors, from executing any of the functions delegated to trustees, as such. A full and complete bond he made indispensable to the performance of any and every act to be done by trustees. Not so with regard to executors; this will be incontestably established presently. Extraordinary powers are given to those visitors, viz., to examine the books of the several corporations to which the testator has made bequests, and the penalty of refusal to submit to the exercise of that power in forfeiture of the bequest. The distinction in question thus appears. Other functions are delegated to the trustees as such. The will devises the estate in *Nova Scotia* to the testator's brother and sister. The codicil of the 24th of *May*, 1827, confirms that devise. The codicil of the 25th of *August*, 1827, revokes the preceding codicil, and devises those estates to the testator's sister. The codicil of the 14th of *November*, 1827, revokes the preceding devise, and then proceeds thus: "I do hereby authorise, empower, and order the executors of my will aforesaid, to sell and execute proper conveyances of all the said lands, and out of the proceeds of the sales aforesaid, which are to be made as soon as may be. I give and bequeath to my sister £150 stg. for her life," &c. We have, then, before us not a devise in fee to sell, but a strict power to sell. The testator, in the eighteenth clause of his will makes this disposition, viz., "I give, devise, and bequeath to His Excellency *J. Q. Adams*, *N. Curtis*, and to my wife *Alicia Boylston*, all my estates, real and personal, with all the privileges and appurtenances to the same belonging, wherever the same may be found, not otherwise herein absolutely and specifically devised and bequeathed. To have and to hold the same to them, and to the survivors or survivor of them, and their successors to be appointed as herein provided for as joint tenants, &c., upon the trusts and the uses hereinafter expressed," &c., &c. The testator says in the same clause: "No part of my real estate shall at any time be sold, unless by the unanimous consent of all my trustees." This, of course, refers to

the estates which he had devised to them. The provision respecting vacancies of trustees is as follows: "Provided, however, that in case either of the trustees named in this will should decline the acceptance of the trusts herein created, or in case of the resignation or removal of either of them, for any cause whatever, at any time hereafter, then I direct that the survivor or survivors shall, in writing under their hands, nominate some suitable person or persons to the Judge of Probate for the county where probate shall be had upon this will, and after due proceedings had upon the application to the Court of Probate for this purpose, according to the statute in this case made and provided, the said person or persons so nominated, if approved by the said Judge of Probate, shall be appointed to this office, and all vacancies in the said Board of Trustees, whether from death or otherwise, shall in like manner be filled up, so that there constantly may be three trustees to execute all the trusts herein created, until the same shall be determined. If neither of the said trustees shall accept said trust, or if the survivor shall at any time neglect to nominate as aforesaid, then the Court of Probate aforesaid, or the Court of Chancery, shall appoint suitable persons to execute the trusts then remaining unperformed, according to the terms of this will, which said trustees so appointed shall give bonds according to law." Then the testator provided for a vacancy among the executors thus: "Any vacancy, of all or any of my executors, to be supplied in the same manner, with the consent of the Judge of Probate." This was obviously *ex abundanti* for every matter required by the will to be done by the executors could as effectually be done by a surviving executor as by all the persons named as executors. Not so with regard to the trustees, for in respect of those the testator expressly provides, "all vacancies shall be filled up so that there constantly may be three trustees to execute all the trusts of the will." Thus it is demonstrated that the testator regarded two classes of officers with different functions, and it is certain from the context of the will, ably and skilfully drawn, that he perfectly understood their different characters at law and in equity, (read *Graham v. Graham*, 16 Beav., 550). It has been seen that he required unanimity in the trustees, but not in the case of the executors.

The question arises,—Who at the death of *Curtis* could exercise the power to sell given by the codicil? The plaintiffs must show themselves executors in the legal sense of that word occurring in the codicil. Assuming they were made such in the legal pursuance of the will, we should have, nevertheless, to inquire whether the power to sell passed to them as representing the nominated executors from the legal effect of the will. I am of opinion that it did not so pass. When such a lawyer as Lord *St. Leonard* has thoroughly investigated a point of equity law, and stated his conclusions, we may safely rest on them. He thus states the rule which must govern our construction of the power under this codicil: "It was held," says his lordship, "at a very early period, that if a man declare his will that B and C, his executors, shall sell his land, and die, and B dies and C makes D his executor, and dies, and D sells, this is void, for the trust is strict." Then his lordship adds, in point to our inquiry: "In the absence of a clear intention, the representatives of an executor could not exercise a power vested in an executor. The *rationale* of the rule is that such representatives, unknown to the testator, could not be supposed to possess his personal confidence. This is the settled rule. The authorities referred to by Lord *St. Leonard* in the next following sections of his work on Powers, show that it is at least doubtful if a power implying general confidence (which a power to sell) will, even by express words, pass to executors of an executor; (secs. 79–83, inclusive). In the will we shall, of course, look in vain for the expression of such a clear intention as the rule requires, because the only reference to the land in question there is an absolute devise. Let us examine the codicil, then, to see whether we can discover in it, read in connection with the will, of which of course it is a part, certain evidence that the testator intended that after the death of all the executors named, their representatives in any sense, or such representatives of the survivor of them, should execute the power in question. If we fail to discover such plain, express declaration of intention, the case is within the rule. This is true even if these plaintiffs have proved themselves, (as they have failed to do,) legally substituted as executors for those named as such in the will.

We are not now inquiring into a remedy in equity for a failing trust. Nor how the duties delegated to the executors as such by the will were to be performed in case of vacancies. The point of our inquiry is, "Is it certain that this testator did not intend that this power should be exercised by those whom he nominated to be his executors, or by the last survivor of them according to the general rule of law, without having, when he declared the power, substitution in his mind at all?" It is certain that he then intended to import in effect the substitution provision found in the will and the codicil. Had such not been his intention, it may reasonably be presumed, particularly as all other provisions are carefully drawn, that he would have directed the estate in question to be sold by his executors, or by those who might represent them by substitution, in accordance with the provision in that respect expressed in the will. That such was his intention is matter of mere conjecture. He may not have intended it. And that consideration alone places the case within the exception in Lord *St. Leonard's* rule. Either the testator, on the point of inquiry, contemplated an exercise of the power by the particular individuals named as executors, (whom he had invested with double characters for distinct purposes,) or by his executors, *qua* executors as a class,—if the former, then the power has not been executed by the man of his confidence; if the latter, then these plaintiffs, not being the original executors, but, (even on the assumption of the regularity and legality of their appointments,) substituted executors, cannot maintain this action. If we could, as I am convinced we cannot, draw a mere inference of intention not expressed, we shall find it highly probable that the testator did contemplate the power being exercised by his nominees personally, for by the codicil to his will dated the 14th of *November*, 1827, and on the 1st of *February*, 1828, he directs that the sales of the land are to be made as soon as may be, and all the nominees were living at the time of his death. The testator has, as regards the sale of these lands, altogether failed to express any intention as to the contingency which has happened, of all the persons named as his executors dying before the actual execution of this power. The rule of law, then, must govern this case.

Lord *St. Leonard* says, in his work on Powers, 616, 645, 646, referring to the case of *Cole v. Wade*: "Although a power of selection be given to the representatives of a trustee by express words, yet it will be strictly confined to those who answer the precise description." It will be seen presently how far these plaintiffs have shown themselves from answering the precise description of executors of the will of this testator. But the evidence before us does not establish that these three plaintiffs have been made executors in legal pursuance of its provisions. This inquiry must be conducted by us bearing in mind the acknowledged principle that powers must be most strictly pursued. We should also bear in mind that we are construing the judicial acts of a foreign court, and a foreign court not of the highest grade,—a court of Probate—respecting which the presumption, *omnia rite acta*, does not perhaps obtain in our Court. This last principle I do not dwell upon, because it involves no consideration of any importance to my judgment in this case. Assuming all the proceedings in these foreign courts of Probate regular, the assumption would not affect my opinion. With regard to the decree of the court that appointed *George F. Williams*; he, one of the plaintiffs, cannot be regarded as in any sense whatever the representative of an executor, or even of a trustee, of or under the will of *Boylston*. The testator expressly required the substitution of a trustee, or of an executor to be made by the Judge of Probate of that county where probate should be had upon his will. It was granted, as already noticed by the learned Chief Justice, by the Probate Court for the county of *Norfolk*, (by which same Court the appointments of *Leland* and *Aaron Williams* were made,) but *George F. Williams*' appointment is by a decree of the Court of Probate for the county of *Suffolk*. But if both decrees were valid, and in accordance with the directions in the will, they are nevertheless utterly inefficacious to prove a title in these plaintiffs to the land in question. Neither of them professes to constitute, and to my mind it is clear beyond a doubt that neither of them was intended, either by those who applied for the decrees or by the courts that granted them, to constitute the subjects of them *executors* of the will in question. *Aaron Williams* and *Leland* are appointed trustees under the last will and testa-

ment of *W. N. Boylston* to act conjointly with *N. Curtis* as "the Board of Trustees required by the will of the said deceased." The Board of Trustees is the precise phrase used by the testator, and the adoption of it thus by the court is *per se* decisive to show that the appointment was intended to refer to trustees, one of the distinct classes named in the will, that class which alone demanded the appointment. Note the conclusive import of the word "required," occurring in the decree. *George F. Williams*, (appointed by a court that had no power to appoint him,) professes to be appointed trustee under the last will of *W. N. Boylston*, of certain estate given in said will in trust, (note this,) as set forth in said will.

Observe here the estate in question was not given in trust. The certificate of one decree is "of the letter of trust to the trustees;" of the other, "of the letter of trusteeship issued to the said trustee." To construe a power to read "trustee" for "executor," would be in my opinion without precedent, and a violation of principle; and to hold that two trustees can act where a testator has said, "not less than three shall act," would be a violent interference with a will. We must, in considering this point of the case, remember that not only are we construing a power, but trying in a court of law a case of ejectment wherein, in all doubtful matters, the presumption is in favor of the defendants. This testator, in his provision for replacing vacant trustees, refers to a statute of *Massachusetts* as that which was to govern the Judge of the Court of Probate. A foreign statute not proved we cannot, of course, judicially notice, yet, if we look at the statute obviously referred to, viz., that of *A. D.*, 1817, chap. 90, sec. 40, vol. 2, p. 470, of *Massachusetts* Statutes, in our Library, we perceive, in view of the testator's reference to it, that it was not intended by those decrees to appoint in substitution executors. To those the sections do not refer, but to trustees. We cannot gather from the evidence whether *Curtis*, the survivor, died testate or intestate. If the former, there existed at his death no necessity for invoking the Court of Probate in relation to the office of executor, which he had filled, since, as has been already observed, the duties under the will attached to that office, could be as effectually performed by his personal representatives after his decease, as they could have been carried out by him as

surviving executor in his life time. It is as true, also, that he alone, when surviving *Adams* and *Mrs. Boylston*, could have done every act required under the will from an executor as such, without a substitution for the two former of *Aaron Williams* and *Leland*, that the three original nominees could have done. When in contrast with this, we reflect that in order to the performance of the trusts, three co-existing trustees were made indispensable in every case by the express direction of the testator, we perceive at once why the Probate Court was invoked, and that the decrees were designed, as their plain language imports, to constitute trustees, and those alone. It follows then, even in this aspect of the case, and even assuming the substitution of *George F. Williams* to have been, (as plainly it was not,) made in accordance with the directions of the testator,—that these plaintiffs have no *locus standi* in this Court, there being in them no interest in the land in question to enable them to maintain the action.

JOHNSTON, E. J., (*dissentiente*).—This was an action of ejectment commenced 16th *June*, 1860, and tried before Mr. Justice WILKINS at *Guysborough* in *July*, 1862. The plaintiffs gave in evidence an unbroken documentary title, deduced from the Crown, in *Ward Nicholas Boylston*, of lands in the present County of *Guysborough*; his power of attorney dated 13th *April*, 1827, to *Robert M. Cutler*, to enter upon and sell such lots as remained unsold; the will of *Boylston*, with three codicils, dated 15th *July*, 1826, 14th *November*, 1827, proved 1st *February*, 1828, and a power of attorney to *Cutler*, dated 31st *October*, 1828, from the persons named as executors and trustees in *Boylston's* will, to the same effect as *Boylston's* power. There was evidence, also, of certain acts for the devolution of their authority on new trustees under the provision of the will which, the plaintiffs say, conferred on them the right to recover the land in question from the defendant under the will. In addition to the title thus set up, *Mr. Cutler* proved that he, under the power from the executors in 1829, advertized a number of lots designated on a plan, for sale at auction as "*Boylston Estate*;" that he made known the authority under which he acted, and that lot 34 was bid off to the defendant for £23, one-fourth in cash,



remainder on note on interest; that the defendant paid him £4 10s. on the purchase, and the note was drawn out, but through inadvertence was not signed by the defendant. It was drawn payable to *Mr. Cutler* for facility of collection, as he said, and was produced at the trial. There is no evidence of anything further having taken place for a very long period. One *Chaffin* acting under powers from two of the plaintiffs first, and then for the three plaintiffs, claiming to be trustees under *Boylston's* will, surveyed or retraced the tract granted to *Hallowell*. He conferred in 1857 with the defendant on the subject of his purchase, and offered to complete his title; and the defendant in effect admitted his purchase from *Cutler*, but doubted *Cutler* and *Chaffin's* authority; and on 15th June, 1860, *Chaffin* served on defendant a notice to surrender possession.

At the trial the defendant's counsel moved for a nonsuit on the following grounds:—1. That plaintiffs are aliens and claim through aliens, and therefore have no title; 2. That defendant took possession under contract for purchase, and no demand of possession was proved; 3. That the land in question was not proved to be in the *Hallowell* grant; 4. That the conditions of the grant have not been proffered; 5th. That possession of defendant is adverse, and has ripened into title. I will postpone my observations on the first objection. There is, I think, nothing in the others. The demand of possession was proved, what the objection to it was is not explained. The land was, I think, adequately proved to be in the *Hallowell* grant, and there is nothing in evidence to authorize the defendant to set up adverse possession against the representative of *Boylston*. But if there had been any questions of fact arising on these points they were for the jury. The 4th objection has since been repudiated.

The learned Judge was of opinion that on the objection of alienage the plaintiffs should become non-suit. Their counsel declined, and the jury was told "to find for the defendant if they were satisfied that *Boylston*, or any others through whom plaintiff claimed were not subjects of the British Crown," and the learned Judge informed them that in his opinion the evidence was excessively strong, if not decisive, to show that *Boylston* was an American citizen. Among these circum-

stances was the fact that *Boylston* had owned and inherited real estate in *Massachusetts*. The jury was also instructed that if the plaintiff, in consequence of alienage, could not give a good title, it was competent for the defendant for that reason, and on the ground of public policy, to raise the objection of alienage. The jury found for the defendant, and the case has come before us on a rule *nisi* to set aside the verdict as against law and evidence,—and for misdirection. I have not been able to bring my mind into concurrence with the learned judge's views. *Boylston* was the son of a British subject; nothing appeared, if indeed anything could, to release him from the obligations, or deprive him of the rights of allegiance to the British Crown; nor was it shown that by the law of *Massachusetts* alienage precluded the inheritance or holding of real estate there; and again the inability to give a good title is no answer to an action of ejectment against a party in possession under a contract to purchase;—he must either accept the title and pay the price, or reject the title and give up the land; to hold the land and withhold the price, is a thing sanctioned neither in a court of law nor of equity. Apart from formal objections, and considering the question—as the Judge at the trial considered it—as arising on a title objectionable only on the ground of alienage. I do not think the defence of alienage maintained, either on the ground of public policy, or of inability to give a good title. And dissenting from the learned Judge, as well in regard to the sole issue which he put to the jury as in regard to the particular instructions in his charge to which I have referred, it follows as a necessary consequence that, in my opinion, the verdict should be set aside, and the rule for a new trial be made absolute with costs.

It has, however, been objected on the part of the defendant that the plaintiff's title failed in proof, and that, therefore, the rule must be discharged. Several things are to be noticed upon this. All the objections taken for non-suit, independent of that of alienage, are insufficient, and some of them required the opinion of the jury, which was not taken. The formal objections raised on the trial, and specially minuted on the Judge's report, are to the papers proving the title of *Boylston*; that title, however, is not required, if the defendant is estab-

lished to be on under contract of purchase from the executors, and the plaintiffs have connected themselves with the executors. The documents in proof of the plaintiffs' right under the will appear from the minutes to have been simply received, subject to the defendants counsel's objection, or indeed, whether any were specified, this would seem to leave the matter too much at large. Apart from the question of alienage, the pressure of the argument arises out of formal objections on this part of the case, and some of them are such as I think ought not to be considered unless they had been taken on the trial.

If I am correct in the opinion that there should be a new trial on the ground of misdirection,—and the remaining inquiry is whether or not the plaintiffs' title was established, with a view to ascertain if a new trial could be of any avail,—I think that in considering the plaintiffs' title this inquiry should be extended beyond what was proved, and should take in what might be proved. In other words, that a new trial under the position of the cause, ought not to be desired on the ground that the title was definitively proved, unless it should also appear that the defects are of such a nature as to be capable of being remedied. This may practically be a consideration of importance. On the question which in this view arises, I have come to the following conclusion:—

*First*; that the *Nova Scotia* lands came under the operation of the general devise in trust as real estate not absolutely and specifically devised.

*Secondly*; I am of opinion that the testator intended to, and did confer on his trustees, as trustees, as far as it was possible to do so, all the functions of executors; that he nowhere intended to discriminate between the two offices; and that he used the word "executors" nowhere as contradistinguished from, but always as convertible with the office of the trustee.

*Thirdly*; I think that the original trustees and their duly appointed successors took an estate commensurate with the purposes of the trusts, and which were, while it lasted, a perfect and complete title, and adequate to support ejectment.

*Fourthly*; the proofs of the appointment of at least two of the plaintiffs as trustees are, I think sufficient, and that the

objection cannot now be set up which might be argued against the other. But if it could be now raised, two might recover in this action.

*Fifthly*; the privity that existed between the executors and trustees under contract with whom the defendant went into possession, was, I think, continued, and existed between him and the plaintiffs.

*Sixthly*; I do not think the objection of alienage available for the defendant against the recovery of the plaintiffs.

The reasons which have brought me to these conclusions I will proceed to state. *First*, as to the effect of the devises on the *Nova Scotia* lands under the will. The *Nova Scotia* lands, including the subject of the action, were devised in fee to the testator's brother and sister. After other specific devises of land and some legacies, there followed in the will a devise of all the real and personal estate, "not herein absolutely and specifically devised and bequeathed," to trustees for purposes fully declared. By a codicil the devise of the *Nova Scotia* lands was modified,—its specific character remaining—and by the last codicil the previous devise was revoked, and the executors were directed to sell the *Nova Scotia* lands, and legacies were given out of the proceeds to his brother and sister. If the will and codicil are to be read together as one instrument, the *Nova Scotia* lands, which at the testator's death were not specifically devised, came under the operation of the general devise in trust, and vested in the trustees. There is nothing opposed to this view in the will, but the contrary is the case, for a purpose is throughout manifested to place the whole estate and its management in the hands of the trustees. No estate is given to the executors in the revoking clause, nor any direction to them to distribute or pay the proceeds or the legacies from out of them. This might have been expected had the testator intended this to be a case exceptional from the trusts, but was unnecessary otherwise, the estate being in the trustees under the general devise, with full authority to pay all legacies. The term "executor" I think was used indiscriminately with that of "trustee," but had it not been so, there would be no absolute incongruity in directing the executor to sell while the title was in the trustees.

As to the effect of the codicil; Lord *Hardwick* says; "A will is to be considered in two lights, as to the testament and the instrument. The testament is the effect and result in point of law of what is the will, and that consists of all the parts, and a codicil is then a part of the will, all making but one testament. But it may be made at different times and under different circumstances, and therefore there may be a different intention at making one and the other." By Lord *Thurlow* in *Hill v. Chapman*, 1 Ves., 405, "a codicil is always considered as part of the will, and the intent is drawn from the whole." So Lord *Loughborough* in *Crosbie v. McDoual*, 4 Ves., Jr., 616, says, "that if a testamentary paper purports to be coupled with another instrument, (and this it is which makes it a codicil,) it is as much a part of that instrument as if it was written upon the same paper." In 17 *Simons*, 108, *Evans v. Evans*, the Vice-Chancellor said; "My opinion is that I must take the codicil to be part of the will to all intents and purposes." And in *Hartley v. Tribber*, 16 Beav., 315, (1853) the Master of the Rolls said; "But I am clear that the Court may not only look, but is bound to look at the will, and at all the other codicils, for the purpose of explaining any subsequent codicil."

*Second.* As to the intention of the testator in the use of the term "executor." The will gives to the trustees all the functions that pertain to the office of executor, as far as it is possible to do so. All the personal estate is given to them, (as well as the real,) to be collected and disposed of under the trusts declared; they are to pay the formal charges, the debts, the legacies, and the annuities; besides this general duty, provision is made to meet the varying circumstances to which the estate was subjected. Before allotting his widow's income the testator uses this language; "My said trustees shall reserve such funds as they shall think adequate to the payment of my debts, and such legacies and annuities as may become payable during the life of my wife, with as much as they shall think adequate for the maintenance, &c., of my grandson." Then, after the death or marriage of his widow, any unexpended surplus of her income, he says, "shall remain vested in the hands of said trustees, to be held by them with the residue of my estate," and further he says

that after filling the vacancy occasioned in the trust, and "after appropriating sufficient funds to pay all remaining debts, legacies and annuities then outstanding, including the expenses of settling the estate, with their own commissions, the said trustees shall stand seized, &c., of my remaining estate." And after directing his trustees to make certain divisions, the testator in the 14th article deals with the latest contingency to which his estate is made subject, and directs that in the event of the death of his grandson without inheritable issue, his trustees should sell and convert his estate into money, and having paid all the legacies and annuities, and all other lawful claims on his estate, to pay the remainder to the testator's brother and sister.

After the testator had imposed on his trustees all the duties of executors, and given them all the funds for fulfilling these duties, it is not to be supposed that he intended to give to his executors, as distinguished from his trustees, any duties which came within the scope of the trustee's authority, and when he is found using the term "executor" reason and the sound rule of construction require us to interpret the term in harmony with the general scheme of the will. He has used the term in several places in the will and codicils, and in all the instances, except I think three, it is demonstrable that he meant his trustees, as for example; he desires his executors to appoint certain persons to oversee and manage outlying estates, and to account with said executors for the sums they should receive; but these estates he had vested in the trustees charged with the execution by them of the trusts attached to them. To suppose he meant any but the trustees by the term "executor" would be to charge the testator with mere fatuity. Again he manifests in express words that he applied the two terms indiscriminately and meaning the same thing, for he says that if either of the persons named "as executors or trustees" should decline either "of said trusts," the bequest given to said executor or trustee shall be void, but not to bar the said trustee or executor from charging a reasonable commission for his services, and it has been seen that all the duties of the estate were imposed on the trustees, and that they were to deduct their commission, the executors, *qua* executors, could not decline the trusts, nor had they oppor-

tunity to earn commission. Another instance yet more distinct occurs; he says, "My executors who are hereafter named as trustees shall, during the continuance of said trust, their survivors or successors have visitorial power," &c., &c., (over his charities). No doubt is open here as to the testator's meaning, for he has made himself his own interpreter. The only single expression in the will that might denote in the mind of the testator an idea of distinct function, is what follows the clause respecting the bequests to his executors or trustees before alluded to; it is, "any vacancy of either or all my executors to be supplied in the same manner with the consent of the Judge of Probate." This, if it is to be presumed to mean "in the same manner" as in the case of the trustees, but shows the extreme earnestness manifested by the testator elsewhere that the management of his estate should not on the death and so forth of the trustees fall into the hands of those upon whom the trusts would by law devolve. As the executors and trustees were individually the same, the testator by desiring their successors to be alike subjected to the approval of the same authority showed his desire that the same individuality might be maintained, and so evinced his intention that no distinction of functionaries should exist in the management of his estate. Besides, as executors are the legal representatives of the estate, it might be thought necessary to keep the office filled to meet any emergency that might arise. When, therefore, the testator directed his executors to sell his *Nova Scotia* lands he meant, to use his own expression, the persons named as trustees, according to the untechnical mode in which he had in several other instances expressed himself; and in conformity with the general intention manifested throughout his will, and with the scheme of management under which he had placed his estate.

But it may be necessary to pursue this subject further. I cannot divest from my mind that under the circumstances of this case, to contradistinguish between executors and trustees is to sacrifice the sense to the sound. What is an executor? *Williams*, vol. 1, p., 226 says; "An executor, as the term is now accepted, may be defined to be the person to whom the execution of a last will and testament of personal estate is by the testator's appointment confided." But the

testator *Boylston* has by his last will and testament confided the entire management of his personal estate to his trustees, or I might say to his executors, by the name of trustees. There is not, as I believe, through all the pages of this will a single instance of any duty connected with the personal estate being confided to his executors as executors, and every power and duty connected with the personal estate, which he could give to his trustees, (for there are some duties which he could not disconnect from the office of executor,) he has confided to his trustees by that title. Again Lord *Hardwicke* says: "An executor from his name is but a trustee, he being to execute his testator's will, and therefore called an executor. . . . This is the reason why the spiritual court cannot compel a distribution, because they cannot enforce a trust." Here the trustees fulfill the characteristics given in both these definitions; the executors do not. The powers and duties relating to the collection and disposal of his personal estate are so interwoven with the powers and duties connected with the real estate, and the trusts declared so embrace the whole as one subject that an attempt to disassociate them would be vain. To follow practically this idea, we find if the testator meant executors distinguished from trustees in the codicil under consideration,—that the executors have the naked power to sell, while the legal estate in the land to be sold is in the trustees under the devise in trust. The executors after selling have no power to pay the legacies granted out of the proceeds, but the duty of paying all the legacies is imposed on the trustees, and what is still more significant, the executors would have no authority over the remainder of the proceeds, because, as has been shown, the trustees are directed to dispose of the whole and remainder of the personal and real estate, after having discharged all claims, including their own charges of management. And however it might be said that from the power to sell might be inferred the authority to dispose of the proceeds, if it stood alone; it cannot be so held here in face of the direct authority given to the trustees, and the stronger inferences offered.

I do not find that the rules laid down for the interpretation of wills compel us to give the word in question a meaning contrary to the intention manifested elsewhere. It is true



technical words are to receive their legal meaning,—perhaps it may not be violating this rule in its letter, if looking at the definitions alluded to above, the testator is understood to mean the persons to whom he had confided the execution of his will under the trusts he had declared. The rule, however, is subject to modifications. Lord *Macclesfield* in *Forth v. Chapin*, 1 P. Wms., 667, gave the same words different meanings according as it applied to realty or personalty. In this instance the duty did not relate to the duty of executor, it was a trust distinct from that duty. In *Williams on Executors* (6th Am. ed.) vol. 2., note on p. 1088, *Mr. Jarman's* rules are given; “7th. All the parts are to be construed in relation to each other, so as if possible to form one consistent whole.” And *Mr. Williams* adds in a note at page 1081; “A codicil is to be taken as a component part of the will;” and again at page 1084 says; “The tendency of modern decisions is to read the different clauses of the will referentially to each other, unless they are clearly independent;” and at page 1084, he considered the doctrine as fully established that the general intent, although first expressed, shall overrule the particulars. On page 1082; “General words in one part of a will may be restrained in cases where it can be collected from any other part of the will that the testator did not mean to use them in their general sense. Hence, generally speaking, if the same words occur in different parts of the same will they must be taken to be used everywhere in the same sense, unless there appears a clear intention to the contrary.”

Now from the extracts I have made from the will, it appears that he used the word “executors” where incontrovertably he meant the persons who were to execute the trusts of his will. Again, that he used the term “my executors or trustees” in relation to matters that were applicable to the trusts he had declared, showing that he attached the same meaning to the two expressions and applied it to the duties of the trustees. And again he blended the two terms in one common meaning where he said; “My executors whom I have appointed my trustees.” Truly. The devise in trust is in the following terms; “I give, devise and bequeath to my executors, *John Quincy Adams*, *Nathaniel Curtis*, and my beloved wife *Alicia*, all my estates, both real and personal,

with the privileges and appurtenances wherever the same may be found, not otherwise herein absolutely and specifically devised and bequeathed, to hold the said real estate and possess the said personal property to them and to the survivors and survivor of them, and their successors to be appointed as here-in provided for, as joint tenants in fee, and ~~not~~ tenants in common, upon the trusts and to the uses hereinafter expressed, and upon no other trust or use, and for no other purpose, that is to say, upon the special trust and confidence that they, the said J. Q. A., N. C., and A. B., and the survivors and survivor of them, and their successors as aforesaid, shall enter upon, stand and be seized of the real estate aforesaid," &c.

There is no doubt that under this devise, and the trusts declared in the will, the original trustees took a perfect estate in the lands for life, and during their continuance in office. This estate I think continued in the survivors and survivor until the appointment of successors, notwithstanding the direction that the number should be always kept full. *Doe d. Read v. Godwin*, 1 Dow. & Ry., 259, (May, 1822,) is to this effect. There the appointment of trustees and the direction to fill up the number were under an Act of Parliament, which was considered analagous to the powers in a private settlement although of higher authority, and the Court thought that the legal property remaining in the survivors, their conveyance was inoperative in a court of law, and it was for a court of equity to apply a remedy if the directions in the trust were not carried out, or for that Court, (the King's Bench,) to interpose a *mandamus* to fill up the complete number. *Townsend v. Wilson*, 1 B. & A., 608, (*Trinity*, 1818,) is apparently in direct opposition. But of this case Lord Eldon in *Hall v. Dewes*, Jacob's, 189, (1821,) entirely disapproved; and in language stronger than usual, he said he would be sorry to have it recorded that he agreed to that case; and it is to be noted that *Townsend v. Wilson* was not mentioned in *Doe v. Goodwin*, which was nearly four years later, and although *Abbott and Bayley, JJ.* concurred in both cases.

There would appear to be a distinction between the appointment of substituted trustees by surviving trustees

under a power, and by the Court of Chancery. In the former case there must be a conveyance as well as appointment, in the latter not. Both points appear in *Foley v. Wontner*, 2 Jac. & W., 246, (1810,) where the Lord Chancellor said; "These persons cannot associate others with them to act as trustees; they must be trustees or nothing. In such cases the Court would fill up the number, and would direct them to carry on the trusts of the deed."

Under *Mr. Boylston's* will the appointment is to be by act of the Court,—the surviving trustees nominate and apply to the Judge, "and after due proceeding had upon the application to the Court of Probate for this purpose according to the statute in the case made and provided, the same person or persons so nominated if approved by the Judge of Probate shall be appointed to this office." And in case of a neglect to nominate, the Court of Probate or the Court of Chancery,—moved it must be presumed by a party interested,—shall appoint suitable persons to execute the trusts remaining unperformed. Here are indicated proceedings in a Court acting under statute terminating in a judicial decision giving to the party appointed the estate and powers of an original trustee,—consequently under these authorities. Assuming the power to exist in the Court, the remaining trustees with the appointees, and the appointees alone, after all the original trustees have been removed, and whether the whole number should be three or less,—have an estate which a Court of law will respect.

*Fourth.* Under the proof of the appointment of the plaintiffs as trustees arise the chief technical or formal difficulties in the case. On the 28th August, 1852, two of the plaintiffs were appointed trustees by a decree of the Court of Probate for the county of Suffolk in *Massachusetts*, as appears by the recital in a commission of that date under the seal of the Court addressed to them, by which decree they were constituted trustees under the will of *Ward N. Boylston*, to act conjointly with *Nathaniel Curtis* as the board of trustees required by the will of the deceased; (*Curtis* was one of the original trustees;) and the commission directs them to manage the estate and discharge the trusts according to law and the will of the deceased. On the 15th June, 1857, the other

plaintiff, *George F. Williams*, received a commission under the seal of the Court of Probate of the county of *Suffolk* in *Massachusetts*, in which it is recited that he had been that day duly appointed trustee under the last will of *Ward N. Boylston*, of certain estate given in trust in said will as there set forth, and the Judge thereby, in pursuance of the power and authority to him granted, did commit to the said *Williams* the said trust to execute according to the true intent of the testator.

Many objections have been raised on these documents, some by counsel of defendant on the argument, others have suggested themselves to some of ourselves. Whether any of them were taken at the trial does not appear, and, therefore, as the deficiencies, if deficiencies existed, were capable of being supplied, I think the objections ought not to be entertained now. If, however, they are to be, they should be, I think, confined to those raised at the argument. These were; that there was no evidence of the existence of the court, or that it had the authority or jurisdiction. Besides these, it has been suggested since the argument that the nomination under the hands of the surviving trustees should have been shown; that the decree itself should have been produced; and in the last case, that it does not appear that any formal decree passed; and there is added a more serious objection, that the last commission proceeded from the Probate Court of *Suffolk* and not of *Norfolk*.

Regularity of proceedings in inferior courts is presumed where the case is within its jurisdiction; *Brown v. Gill*, 2 C. B., 861; *Regina v. Hickling*, 7 Q. B., 880. But the presumption does not apply to give jurisdiction to inferior courts and proceedings before magistrates; *Rex v. All Saints*, 7 B. & C., 785; *Rex v. Gilkes*, 8 B. C., 430. The Courts, I think, go further as respects foreign judgments than they do in the case of inferior jurisdiction at home. Unless the contrary appear, the Court will presume that the decision in a foreign judgment is consonant to the justice of the case; *Arnott v. Redfern*, 3 Bing., 353. Lord *Eldon*, in *Wright v. Simpson*, 6 Ves., 730, is very strong; "Natural law," he says, "requires the courts of this country to give credit to those of another for the inclination and the power to do justice; but

if that presumption is proved to be ill-founded in any particular case, the court cannot of course act on that presumption." This was said in distinct reference to the question whether courts in a foreign country must be supposed to decide according to the law of that country. How does the case stand? A testator recognizes in a tribunal,—well known in our own laws as to its general attributes and subjects of control,—a special power given by statute over a matter falling within the general range of subjects over which the cognizance of such court extends, and he directs that that power be exercised in the case of his own estate. The power in itself is very simple,—the sanctioning of an appointment of successors to his trustees. The right of an individual to direct a succession of trustees is not questioned in *English* courts, therefore there is nothing here to jar with acknowledged principles. The power thus recognized and invoked by the testator we find to be in fact exercised, and the act is accredited by a commission under the seal of the Court of Probate.

I do not think we reach the limit, much less exercise it, of the rule which Lord *Eldon* expressed, in giving credit to that court for possessing the power it undertook to exercise, as well as the credit for exercising it with all proper circumstances and regularity. As the right of the plaintiffs to recover is dependent on the validity of their appointment by the Judge of Probate, I think it proper to pursue this subject somewhat further.

It cannot be necessary to collect authorities to show that where a foreign court possesses jurisdiction, the regularity of its proceedings will be presumed. This seems to be so uncontroverted a proposition that time would be lost in discussing it, and the remaining question is as to the power of the Probate Court, and this again is reduced to the inquiry whether the act of the court is *prima facie* evidence of its power or jurisdiction. The cases on the weight to be given to foreign judgments, including the courts of *Scotland*, *Ireland*, and the colonies, are extremely numerous and to some extent contradictory. The differences of opinion have been confined to the question whether these judgments shall be accepted as conclusive or as only *prima facie* evidence. Chief Justice *Eyre*, in *Sinclair v. Fraser*, held to the latter, and is followed

by other Judges. Later decisions run in the opposite direction. The Vice Chancellor, in *Martin v. Nicolls*, 3 Sim., 461, reviewed the cases, and adopted what he stated to be the views of Lord *Kenyon* and Lord *Ellenborough*, supported by the ancient authorities,—the doctrine that a foreign judgment is not examinable at Westminster Hall. Lord *Denman* in 1839, in *Ferguson v. Mahon*, 11 Ad. & El., 179, and in 1844 in *Henderson v. Henderson*, 6 Q. B., 288; Lord *Campbell* in 1851, in the *Bank of Australia v. Nias*, 16 Q. B., 717, held the same opinion. While Chief Justice *Eyre* took the lower view of the force of a foreign judgment, he gave it efficiency till it was impugned; and on the other side, although the judgment was said to be conclusive, it was only so under certain conditions. A few words from each of the cases I have referred to will explain the extent to which all the authorities concur, and show a point in which all centre. Chief Justice *Eyre* says, and *Best*, C. J., in *Arnott v. Ralfern*, 3 Bing., 353, agrees; "Foreign judgments are *prima facie* evidence of a debt, although it is competent to the defendant to impeach the justice of them, or to show that they are irregularly or unduly obtained. Lord *Denman* says, that enquiry is still open, not indeed into the merits of the action, or the propriety of the decision, but whether the judgment passed under such circumstances as to show that the court had properly jurisdiction over the party. And again by the same learned Judge; "Several pleas were pleaded to show that the defendant had not had justice done him in the Court of Chancery in *Newfoundland*. This is never to be presumed, but the contrary principle held, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court are repugnant to natural justice." Lord *Campbell* is yet more particular; doubtless it is open to the defendant to show that the foreign court had not jurisdiction over the subject matter, or that he never was summoned to answer and had no opportunity of making his defence, or that the judgment was fraudulently obtained. Perhaps it was in contemplation of these modes in which a foreign judgment may be impeached that it has sometimes been said to be only *prima facie* evidence. Thus, whatever other other differences of opinion may have existed, in this there is universal agree-

ment,—that a foreign judgment in the first instance is accepted as evidence of what it imports,—of the jurisdiction of the court and of the justice of the decision, and of the regularity of the proceedings, and it is for the defendant to impugn it.

In applying this principle to the present case it is necessary to note the nature of the act of court which is relied on. Were it a judgment on which the defendant was sued it would be necessary to prove the judgment. But here is an authority to act. A commission under the seal of the court is what is required: and that is proved, and brings with it the presumption that it was legally and properly granted, and that the decree or order on which it professes to have passed was duly made. Lord *Campbell* referred in terms of commendation to the able summary on the subject which was to be found in *Story's Conflict of Laws*, and in *Smith's* notes to *Leading Cases*, which he said he had examined, and he seemed to intimate that his reference to them made it unnecessary to go himself into detail. I have examined both books and can find nothing to militate against the above proposition as respects any of the courts alluded to in them, but the contrary, whether they be courts of Law, Chancery or Probate, or Ecclesiastical in any branch, of Admiralty, or Courts Martial, and I refer to these two last books without loading my judgment with detailed references. There are some instances to which I must allude more distinctly, on account of their nearer analogy to the circumstances of this case. *Allen v. Dundas*, 3 T. R., 125, touches the effect of Probate. *Rex v. Grundon*, Cowp., 315, decided that a sentence of expulsion from a college was conclusive, on the express ground that it resembled the sentence of the spiritual court, and this was in justification of an assault, and the resemblance to the sentence of a court was sufficient; so "the sentence of a college visitor depriving or expelling is conclusive;" 2 *Smith's L. C.*, 447. The remark of that learned editor is immediately applicable to the case before us. He says; "Sentence of deprivation by a visitor appears to differ from the other cases above touched upon in this respect, viz., that it is the sentence of a tribunal which has in many instances been created by a private individual. This does not, however, seem to alter the

principle ; for, though no private person can create a court whose sentence shall have operation on the person or properties of others, yet there is no reason why he should not create one having operation on his own ; unless, indeed, he introduce some term inconsistent with public policy. Thus on the same ground on which a visitor's sentence is supported stands the case of the trustees of a school dismissing the school-master for misconduct ; *Doe v. Hadden*. (See *Reg. v. Darlington School Governors*, 6 Q. B., 682) ; and the ordinary case of an arbitrator whose forum is a domestic one, constituted by the parties themselves who are bound by its award. While I have quoted these passages as applicable I would not be understood as placing the order of the Probate Court of *Massachusetts* on a footing with a tribunal constituted by an individual. But as the order of that court in this case adds to its interest or state powers, the authority of the testator in relation to his own property, it is not inappropriate to notice the circumstance that both grounds of authority combine here. On this question it has occurred to me that less strictness of proof would reasonably be required to support,—or perhaps I might say a larger presumption would be extended in favor of a commission extending over the general management of an estate than a judgment the sole object of which is to charge an individual with a debt for the benefit of him who adduces the document.

The objections to the commission of one of the plaintiffs that is issued from the Probate Court of the County of *Suffolk*, is a serious one, because the will speaks of the Probate Court of the County where the will should be proved, and this was the County of *Norfolk*. There may be some explanation given ; and as the objection was not taken at bar, I think we ought not to consider it ; especially as at the trial, if no explanation could be offered, at least it might have been moved to strike out this plaintiff from the record. But if it should be considered, and should prevail, there remain the two other plaintiffs, free from the objection, and I have shewn that it is not necessary to keep up the full number for preserving the title and maintaining ejectment ; and under the *Revised Statutes*, (3rd Series), chap. 134, sec. 148, the Court shall inquire which of the documents, if more than one is



entitled. Two powers of attorney were in evidence to *Chaffin*; one from *Aaron D. Williams* and *W. S. Leland*, two of the plaintiffs, dated 2nd *May*, 1857, before the commission to the other plaintiff—the second from the three, dated 12th *February*, 1859, after the last commission.

5thly. The defendant purchased the land that had belonged to *Boylston* from his executors being his trustees. The plaintiffs are successors in the trust, and as such, have the estate in the land, and can maintain ejectment, although the codicil had authorized the executors as executors to sell. But with such a will as that before us to separate this one portion of the estate from all the rest, and to require a succession of executors to be maintained for its management and disposal, as well as a succession of trustees for the management and disposal of the rest, would certainly not be to pay respect to the cardinal principle in the construction of wills, that the general and prevailing intention should govern, and if it should be added to this that the two classes of functionaries, thus kept distinct, were the same individuals, the incongruity would become more striking,—the distinction more needless and unmeaning,—and when we observe that all the occasions on which the term executor is used, relate to matters foreign from the office of executors, and all the duties that belong properly to that office are in express and reiterated terms, conferred on the trustees as trustees, we must impute to the testator a confusion of ideas, and a meaningless desire to frustrate his own deliberate intentions, and to defeat the general purpose of management which his will most elaborately and distinctly evinces throughout its voluminous details, before we can believe that he used the word “executors” in any other sense than as intending the trustees he had appointed, to execute his will. Nevertheless, I repeat that were all that can be objected on this ground to be assumed as correct, still, the legal estate being in the trustees, under the devise of all the real estate not specifically devised—as the *Nova Scotia* lands were not—they, and they only, are entitled to maintain ejectment for these lands.

6thly. On the subject of *alienage* it might perhaps be sufficient to say that I concur in the opinion expressed by the learned Chief Justice, on that question which I have had the

benefit of reading. I may, however, quote the language of the Master of the Rolls in *Barrow v. Wudkin*, 24 Beav. 1, from its pertinency; "it may, I think, be treated as a fact that no statute exists declaring that a trust of real estate in favor of an alien is void, then is it void by operation of law,—in other words by the common law,—is a trust of land in favor of an alien, void? This also is a proposition that must be answered in the negative. It is unsupported by authority or principle. It is quite clear that a devise of the legal estate in fee simple to an alien is good. He takes the land, although he cannot hold it: the devise is not void but takes effect in him, although not for his benefit," &c., &c.

The case of *Fish v. Klein*, 2 Merivale 435, does, in no respect, militate with this—there it was directed that a vendee in a suit for specific performance should not be obliged to take a title coming through an alien trustee. This, of course, for it was never supposed that an alien had a perfect title, or could grant. What is contended is that the devise to an alien is good to carry the legal estate, and that on that he may maintain ejectment. In this case the objection is not one of more than questionable honesty. It rests on the narrowest grounds. The testator was a British born subject, and the property was to be sold for the benefit, mainly, if not entirely, of his brother and sister, undoubted British subjects. But it is objected that the plaintiffs, the trustees to effect the sale, appointed by Act of Court only two years before the passing of our Provincial Act, which would have removed the supposed disability,—are American citizens. Then, as regards the policy of the law, our position is singularly incongruous. When the cause was tried, and for eight years before, and now, the policy declared by legislative enactment was to permit aliens to hold, convey, and transmit real estate. Looking backward across that period, the policy was different. While we must give the reservation of existing titles, any necessary force it may possess, we are not called upon to favour a defunct policy; rather may we adopt the sentiment of the Court in *Shepeler v. Durant*, 25 L. & E., 334, in relation to a plea of a lien executory; "we will require the utmost technical strictness, and make every intendment against such a plea."

But I do not think that it is competent for the defendant to take the objection of *alienage*. Assuming the plaintiffs to be trustees of the will, he stands in the relation of contractor to purchase; and it is repugnant to principle that he should withhold possession on that pretence. Its flagrancy may not be so striking when the value is small and there has been great delay; but the principle does not depend on circumstances, and on principle the question is to be determined whether a *British* subject may retain real estate, it may be of great value, without paying for it, because the party he engaged to buy it from is an alien. It does not change the principle, but aggravates the circumstances if—as in the present case—he had been made acquainted with the title and the nationalities. In such a case the wrong is patent, the outrage in question is audacious, and a remedy would probably be found if the Crown were properly moved, inquest of office, writ of intrusion, sale, and disposition of the proceeds to this practically true owner. A remedy, however, may justly be looked for less dilatory, uncertain, and expensive,—and if a principle exists which in any case would preclude one who entered under another from withholding possession, it cannot be requiring too much from the laws of civilized people that the principle be extended to the case I have put. It is not a moral usury or a legal offence for an alien to regain real estate, and, although his title should be liable to be defeated by the Crown, the transaction is not void, and his enjoyment of the property is of value, however uncertain its continuance. There is, as we know, such a principle in the relation of landlords and tenants, which has been extended to other cases, and I must see some reason,—I have been able to discover none,—which makes its application to the present case illogical, inconsistent, or improper, before I could feel justified in allowing the defendant to set up the objection of alienage, although I believed it to be otherwise an available defence. The case of *Doe d. Johnson v. Baytrup*, 4 N. & M., 840, supports this view entirely. There the defendant claimed title paramount to the plaintiff, and did not go into possession under the plaintiff,—circumstances which make that case infinitely stronger than the present, in favor of the defendant; yet, because she got the keys on pretence of going

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into the garden, and so entered the house, which was vacant, the Court set aside a verdict found for the defendant on the merits and made the rule absolute, not for a new trial, but to enter the verdict for the plaintiff. This went on the ground of fraud, but one of the Judges thought that the defendant's entry might be considered as an entry under the plaintiff because the key had been procured from her agent. The language used in giving judgment puts aside any notion that the principle is confined to cases of fraud. Lord *Denman*, C. J., said, "when one party obtains possession by license from another, whether for a longer or shorter period, or for any beneficial purpose to himself, he is thereby prevented from afterwards questioning the title of that other person in any action of this sort;" and, by *Pattison*, J., "It cannot be contended that the same rule which applies between landlord and tenant ought not to apply to any person who comes in by the permission of the party actually in possession. There is no reason why the relation of vendor and purchaser should make a difference. The vendee in possession is, in Equity, the owner, with a liability to pay the purchase money; but at law he is tenant at will." Our act enabled the defendant, if he imagined he had Equities, to set them up in this action by equitable pleas; nor, if he desired, should I hold him precluded now. But instead of this, he defies the plaintiffs,—not on pretence of any title in himself, but challenges them to prove their own. Is it not an absolute absurdity that a man going into possession under another should desire him to prove his title and be at liberty to catch at every slip or informality in it? Yet at the trial and at the argument of this cause two-thirds of the objections were raised on the formality of proof in the title deduced from the Crown down to *Boylston*. Besides the general principle, however, there are cases distinctly applicable, as they arose between vendor and purchaser. Of this nature are *Doe d. Counsell v. Caperton*, 9 C. & P., 117, and *Doe d. Bord v. Burton*, 16 Q. B., 808. In the first the circumstances are peculiarly strong; the purchaser went into possession, (having paid deposit,) nineteen years before action,—levied a fine, raised money on mortgage, dealt with the property in all respects as owner, and died in possession. *Alderson*, B.,

considered, and the jury found the possession not to have been adverse on account of its origin, and the plaintiff recovered. The second of these cases is also strong—in this, that the defendant was in possession before he agreed to purchase; yet, inasmuch as from the agreement, it was inferable that he recognized to hold under the plaintiffs, he was not allowed to continue his possession after he refused to complete the purchase.

To repeat in a few words the result of these reasonings: 1st. I think the mode in which the case was put to the jury makes a new trial necessary independently of the inquiry into the plaintiff's title.

2nd. I think that enquiry is precluded, because the objections to the plaintiff's title do not appear from the Judge's minutes, or otherwise, to have been taken on the trial,—when some of the things, at least, might have been removed by evidence, and there were some that were subjects for the jury. But assuming it to be necessary to go into the title, I think the evidence was sufficient to establish it, for—*First*, the trustees were the proper parties to be plaintiffs, and any number would suffice,—the legal title being in the trustees under the devise in trust, and not affected by the power to sell, although that had been in the executors contradistinguished from the trustees,—for we are dealing with title not powers, with law not Equity,—illustrated in the case of *Doe v. Goodwin*, cited above. *Second*. But the trustees were the proper parties, supposing that question to be affected by the power to sell, because the power to sell was given to the trustees—the term “executors” used in the codicil being used convertably with, and meaning the trustees.

3rd. The evidence is sufficient to shew a regular devolution of the office of trustees upon the plaintiffs, it being for the defendant to impeach by evidence the authority or regularity of the proceedings.

4th. The defendant, by his contract to purchase, admitted the title of the testator and is precluded from disputing the right of any party clothed with that title.

5th. The question of *alienage* is therefore excluded, although it had been an available defence otherwise, which, however, I am not prepared to admit.

6th. I think the question of defendant's possession should have been left to the jury, and, being found not to be adverse, as it must have been under the evidence of *Cutler*, there remained no other question except the regularity of the appointment of the plaintiffs as trustees. I think the proof was *prima facie*, abundantly sufficient; but if a different opinion should prevail, the plaintiffs should have an opportunity of proving the decree, &c., &c., especially as it does not appear that this objection was taken at the trial.

Lastly. Did the rule in this case and the general practice of the Court warrant it, I think the plaintiffs would be entitled to have judgment absolutely, according to *Doe v. Baystrop*. As it is, I am very decidedly of opinion that the rule for a new trial should be made absolute with costs.

Standing, as I do, alone in the conclusion at which I have arrived, and in most of the propositions I have announced it was proper that I should state the grounds on which my opinions rested, and I ought to doubt the correctness of my views, but the human mind is not a machine, and we cannot control the results to which our own reason when fairly and fully exercised may lead us. It would, however, afford me pleasure to know that I have been wrong in the judgment I have formed in this case, because it would relieve me of the pain of believing that an honest claim made by foreigners has been dismissed on technical objections which, I cannot satisfy myself, have in them the weight that has been attached to them.



## AVON MARINE INSURANCE CO. v. BARTEAUX.

DURHAMST, a British subject resident in this Province, insured his brigantine on a time policy with the plaintiffs. The vessel, while on a voyage from Liverpool G. B. to New York, sustained damage which was the subject of general average. The average was adjusted at the port of destination, and was pleaded by defendant as a set off to an action on the premium note. It appeared that the average, as adjusted at New York, amounted to a larger sum than if adjusted in Nova Scotia.

*Held*, that the underwriter is bound to reimburse all such general average charges as have been assessed on the insured by a foreign adjustment, if correctly settled according to the law of the port of adjustment. Also, that a time policy, unless there be special restrictions, confers the power of sailing from any port domestic or foreign, and, in this Province, foreign employment must be understood to be as much in the contemplation of the owner and insurer as domestic use.

*Seemle*, that the foreign adjustment to be binding must be clearly proved to have been made in strict conformity with the laws and usages of the foreign port, and would, doubtless, be set aside, or corrected for fraud or gross error.

SIR WILLIAM YOUNG, C. J., now, (January 7th, 1871.) delivered the judgment of the Court:—

This was a special case, stated for the opinion of the Court, involving questions of general and particular average. The latter was withdrawn in the course of the argument, and the former turned on the obligation of the underwriters to pay the general average upon a foreign adjustment. The defendant pleaded such an average, by way of set off, to an action on the premium note, and the admitted facts are that the defendant, being a British subject resident in this Province, and having insured his brigantine, the *Foyle*, on a time policy with the plaintiffs; the vessel, on a voyage from *Liverpool* to *New York*, sustained damage, which was the subject of general average, and, if adjusted at *New York* would amount to a larger sum than if adjusted in *Nova Scotia*. The single point, therefore, for our determination is, by what law ought the general average to be ascertained; by the usage as it prevails in *New York*, or by the usage of our Province, where the policy was made.

Although the weight of authority is in favor of the foreign adjustment, this must still be considered one of the *variations* in mercantile law. In *Parsons on Mercantile Law*, 1, p. 332, ed. of 1859, he cites, in note 4, a number both of *English* and *American* cases where the adjustment made at a foreign port was held not to be binding on an insurer, and where it was held that it was so binding; the latter cases, however, being the later in point of time, and of the higher authority.

The leading *English* case, which figured so largely at the argument, is that of *Simonds v. White*, 2 B. & C., 805, decided so far back as 1824. Lord *Tenterden* there puts it on the footing of a known maritime usage, which the shipper of goods must be taken to have tacitly, if not expressly, assented to. And by assenting to general average, he must be understood to assent also to its adjustment at the usual and proper place, that is, at the home port, or at the port of destination and discharge. If the shipper is so bound, it is plain that he will not be indemnified under his policy if the underwriter be not equally bound. In *Strong v. N. Y. Firemen Ins. Co.*, 11 John's, 323, *Van Ness, J.*, in giving the opinion of the Court said; "There is no principle more firmly established than that the insurers are bound to return the money which the insured has been obliged to advance in consequence of any peril within the policy, provided it be fairly paid and does not exceed the amount of the subscription." *Arnould*, in his treatise on insurance, vol. 2, p. 812, 813, argues with irresistible force, that it seems impossible, on general principles, to arrive at any other conclusion. The law of *England* compels the owners of the several interests, (that is, the ship, cargo, &c.,) to pay all general average charges assessed on them by foreign adjustment, if settled according to the law of the port where it is made, whether such charges would be allowed in *England* or not. Now it seems certain that the *English* underwriter must be bound by the very terms of his contract, to reimburse to the assured their proportion of all such general average charges as they, the assured, have been compelled to pay by the law of *England*. If this be so, and it seems quite incontrovertible, then it follows, by necessary inference, that the underwriter is bound to reimburse all such general average charges as have been assessed on the insured by a foreign adjustment, if correctly settled, according to the law of the port of adjustment. Several of the cases cited at the argument rest upon distinctions which have no application here. A foreign adjustment, to be binding, must be clearly proved to have been made in strict conformity with the laws and usages of the foreign port, and it would, doubtless, be set aside, or corrected, for fraud or gross error. The case in hand is relieved of all such enquiries, as we have merely to settle the



principles on which the adjustment is to be made. It was ingeniously argued by *Mr. McDonald*, for the insurers, that supposing the rule to be established, on a voyage defined in the policy, and extending to foreign ports, where the operation of the rule might be fairly contemplated, it would not apply to a time policy as in this case. But a time policy, unless there be special restrictions, confers the power of sailing from any port, domestic or foreign, and in our own Province, whose ships are to be found in every sea, and where the ship, once launched, often instantly embarks in foreign commerce, and never returns, perhaps, to her home port, foreign employment must be understood to be as much in the contemplation of the ship owner and insurer as domestic use. No authority, besides, was cited for this distinction. The only *English* case that seems to have touched this question since 1860, is that of *Fletcher v. Alexander*, L. R., 3 C. P., 375, 384, decided in 1868. There *Bovill*, C. J., observed that "different countries have adopted different rules with regard to almost every point connected with the statement of averages. Upon the general principle all are agreed, but, with those differences in the laws of different countries, it became necessary to ascertain and determine what law was to prevail when a vessel started from a port in one country and its destination was a port in another; or where the adventure came to an end in some intermediate port. And it has now become the adopted and settled law of this country, and, I believe, most other countries, that the adjustment must take place according to the law of the place where the adjustment is to be settled." In *Parsons on Insurance*, vol. 2, pp. 360, 370, all the cases, except the last are reviewed, and many subtleties are suggested which will, doubtless, be resolved as new cases arise. He assigns the principal reasons why a foreign adjustment should bind owners and shippers, and concludes that the rule, like some others of the law merchant, is founded on the average of all the cases, and, on the whole, does justice. If this be allowed it is as much perhaps as can be obtained. Average justice is a significant expression which I do not remember to have found in any of the cases. It is here in a text book of authority, and I met with it, recently, in a production of another stamp, from which it may not be amiss to extract one

or two paragraphs. I refer to a thoughtful and brilliant lecture delivered on the 1st *November*, last, by the Lord Justice *Clark* of Scotland, to the *Edinburgh* Judicial Society, where he vindicates the law and its professors from the reproaches often ignorantly cast at them, and justly observes that in the systems of science there is quite as much uncertainty as in the system of law, indeed a great deal more. "Lawyers," he says, "are not only much more harmonious among themselves than are members of some other professions, but the system and science of law is more consonant with itself, and there are fewer real disputes upon fundamental matters than in almost any other branch of human knowledge. It is only this that the differences of opinion between lawyers, that is, between courts administering the law, come so close home to all our social relations, and tell so greatly upon domestic comfort and personal rights, (as for instance in the varying law upon the question of marriage,) that such differences of opinion assume much larger proportions in consequence of their practical application, than if they were occurring in a more scientific and theoretical dispute. But then we are met on the threshold with the old and vulgar notion that the part of a lawyer is after all an unworthy one, and that truth and falsehood find no place in his vocabulary, and in his science. In one sense that is perfectly true, because law is not conversant with truth or falsehood in that sense. Law aims at nothing more, and can attain nothing more than average justice. It is the general rule made beforehand to embrace a given category of circumstances, and in its application, individual wrong is often unavoidable. The facts being accurately ascertained the general principle is then to be applied. The worse cannot appear the better reason, because that must be taken to be the better reason which the court, after argument, approves, and that is the worst reason which it disapproves, and that is the end of it."

Applying this philosophical principle to the case in hand, and, looking to the average justice which the cases recognize, we are of opinion, in answer to the third question submitted to us, that the insurers are bound to pay the general average on an adjustment to be made at *New York* in conformity with the laws and usages of the *United States*.

## RAND v. ROCKWELL.

DEFENDANT was prosecuted under chapter 19, *Revised Statutes*, (3rd Series), for a breach of the law relating to the sale of intoxicating liquors. There was no actual service upon him of the writ of summons, and the affidavit of the constable verifying the return was informal in being entitled with the surnames only of plaintiff and defendant. Defendant having been convicted in his absence, appealed, and filed the necessary bond under the statute.

*Held*, that when an appeal is taken and perfected from a decision of Justices of the Peace in a summary cause, the judgment below is thereby *ipso facto* vacated and the case stands for a new trial. Also, that defendant having appealed, and thus virtually appeared, and having avoided the judgment below by having taken an important step in the cause, it was not competent to him to repudiate the jurisdiction of the Court below on the ground of want of personal service. Had he wished to avail himself of such an objection he should not have appealed but should have sued out a writ of *certiorari*.

On a second trial no amendment adding or substituting a new cause of action or ground of defence will be allowed.

*Per WILKINS, J., dissentiente.*—A judgment given as the judgment in this case was forms no exception to the privilege of appealing conferred by the statute, and to issue a *certiorari* would have been unnecessary. Judgment by default having been given, defendant, not having been duly summoned to appear, is entitled to an appeal. The want of service of the summons alone is ground for reversing the judgment below. A dissatisfied party appealing from a judgment so entered cannot be held to waive his right to contest the validity of the judgment, not having had an opportunity of opposing the claim which the judgment recognizes.

MCCULLY, J., now, (January 7th, 1871,) delivered the judgment of the Court:—

This case came before His Lordship Mr. Justice *Wilkins*, on circuit in *King's County*, in the term of *October*, 1867, by appeal, and was sent by him on a point reserved to the full Court. Defendant had been prosecuted by plaintiff under chapter 19, *Revised Statutes*, (3rd Series,) for a breach of the law relating to the sale of intoxicating liquors without license. There was no actual service of the writ of summons which, it appears, was issued on the 9th day of *November*, 1866. But one *Charles Johnston*, a constable, having made a return endorsed thereon that he had "left the within at the defendant's residence on the 15th day of *November*, 1866," and having made an affidavit informal in being entitled with the surnames only of plaintiff and defendant, and dated the 24th day of *November*, being the return day thereof, the Justices, *J. R. Hea* and *Simon Fitch*, in the absence of defendant, convicted him in the sum of \$ ——. From this conviction the defendant appealed, and filed the necessary bond under the statute, dated the 4th *December*, 1866. By section 23 of chapter 19, "appeals from the decision of the justices for any penalty or forfeiture incurred under said chapter shall be granted in the

same manner as in the case of summary trials," &c. "And in case of *certiorari* instead of bail required in such cases, (see chapter 148,) the same bond shall be given as in ordinary appeals. And in case of granting a new trial the Court may impose such terms on either party as may best promote the ends of justice." By section 252, chapter 134, "It shall be the duty of an appellant in all cases, whether plaintiff or defendant, to enter the cause for trial or argument and give notice of trial." And by section 257, "In appeal causes the appellant shall cause his appeal to be entered on the docket of Summary Causes, and in case he shall neglect to enter the same, the original judgment shall be affirmed at the instance of the opposite party with costs." By section 258, "In all causes brought up by appeal and contested the Court shall try the same anew." The condition of the appeal bond is as follows:—"If the appellant at the next sitting or term of the Supreme Court for the County shall duly enter and prosecute his appeal, &c., or render the body of the appellant and pay the costs, &c., or shall, previous to the first day of the sitting of such Court, pay the full amount of judgment and costs, then," &c.

The first point to be ascertained in this case is, what was the effect of the appeal thus demanded by defendant and perfected? By the uniform practice in this Court, when an appeal is taken from the decision of Justices of the Peace in cases of summary trials and perfected, the judgment below is thereby, *ipso facto*, vacated, and the case stands for a new trial. And by section 33 of chapter 128, referred to in section 23 of chapter 19, "the Judge before whom the trial *de novo* takes place shall confine the parties to the particulars and set off filed before the Magistrate, and shall permit no amendment thereof." In other words, there shall be no new cause of action or defence allowed on a second trial. The effect of the appeal perfected, being to *vacate the judgment below*, is in entire harmony with the decisions of the *American Courts* on this point. "A valid appeal entirely vacates the judgment or decree appealed from, and if not entered in the Court above, or in case of a nonsuit, the Court above must make a new judgment or decree." *Minor's Dig. title "Appeal,"* and cases there cited. See also 17 *Pick.*, 142; 20 *Pick.*, 510;

5 *Mass.*, 376 ; 13 *Mass.*, 265 and 236. "The appellate Court will try the case precisely as if it were originally brought before them and no trial or decision had been made." See 10 *Pick.*, 374 ; 8 *Mass.*, 132, and 18 *Pick.*, 1-4.

Such being the effect of an appeal, was it competent on the part of the appellant, who had virtually appeared, and had thus avoided the judgment below, by having himself taken an important step in the cause, to repudiate the jurisdiction of the Court below, on the ground, as he alleged, of want of personal service of the writ ? I think not. If he wished to avail himself of such an objection as that, he should not have appealed. He should have sued out the writ of *certiorari* contemplated by the latter part of section 23, chapter 19, and brought up the record below, and moved to quash the entire proceedings. But, at this moment, there is no judgment or conviction existing below. The effect of defendant's appeal being as remarked, to vacate that judgment. The defendant, by his appeal, having taken a step in the cause,—one that has vacated plaintiff's judgment,—seeks to go still further back, and oust the Court below of its jurisdiction, on the ground of want of personal service of the summons. When he (defendant) appealed, he took a step that, in my view of the case, waived any supposed irregularity in the service of the summons, and he could not afterwards object that he had not been summoned. *Ch. Arch.*, 1473, and cases there cited.

There is no written appearance in the Court below, but to appeal is equivalent to it. Preparatory to its being granted, defendant makes oath that he is "really dissatisfied with and feels aggrieved by the *judgment* given in the cause, and that he does not appeal therefrom for the purpose of delay, but that justice may be done therein." This affidavit requires to be headed in the cause. Here, it is of the judgment he complains. If it be said that the judgment was founded on proceedings that were a nullity, for want of service of the writ, then the judgment itself was a nullity, and any execution to be issued would be a nullity. How could a party be *aggrieved* by a judgment taken against him which was in itself a nullity and void ? Assuming that the act of appealing and thereby vacating the judgment below is equivalent to an appearance, then all irregularity in process is not only waived, but even

*the total want of it. Ch. Arch., 218, and a number of cases cited, among others Smith v. Forbes, 10 Exch., 717.*

This cause is now before the Court upon an appeal from an order of His Lordship the Chief Justice at Chambers, sent there improvidently, I think, made *nunc pro tunc*, dated 31st December 1868, confirming the decision of the justices below, with costs. But, if that judgment is already vacated, can such an order be made by a Judge at Chambers, without the cause being first entered at *Kings*, by the appellant, like any other appellate case, the plaintiff having first proved the offence charged, and defendant having an opportunity of being heard. I am of opinion that the appeal being perfected, defendant should have entered it for trial at the next term like any other appeal, when plaintiff would have been required to prove his case. Instead of which he appealed to a Judge to set aside the process, who, with defendant's consent, referred the cause, under objections taken to the summons, to the whole Court. What has since occurred I pass over, because I think the cause is still pending, undetermined, and ought to be remitted to *Kings* for a trial. Had plaintiff's counsel taken prompt objection to the course pursued by defendant, I think it would have prevailed, and as both plaintiff and defendant seem to have misconceived their right remedies, I think this appeal should be dismissed without costs, and the cause sent for trial to *Kings*, as any other appeal case.

WILKINS, J., *dissentiente*.—Judgment having been given by two Justices of the Peace against the defendant by default for want of appearance, he appealed to the Supreme Court at *Kentville*. Appeal in such cases is regulated by section 31 of chapter 128, *Revised Statutes*, (3rd series,) which authorizes an appeal from any judgment, however given, without any qualification or prescribed conditions. I think a judgment given as this was forms no exception to the privilege of appealing conferred by the statute, and that to issue a *certiorari* would have been quite unnecessary. It is only where there has been a trial below that the appellate court is required to try *de novo* above. Where a judgment by default has been given below in a case where the defendant has not been duly summoned to appear, the latter has a right to appeal, and the superior court, if satisfied that there has

been no service of a summons, will reverse the judgment below on that ground alone. A dissatisfied party by appealing from such a judgment cannot be held to waive his right to contest the validity of the judgment on the mere ground that he had no opportunity of opposing the claim of his adversary which the judgment recognizes.

The case brought up by appeal was regularly before the presiding Judge at *Kentville*, and on an affidavit of the appellant to the effect that, although a constable had returned that he had left a copy of the writ at the appellant's residence, and although that return was accompanied by an affidavit of the constable that he believed defendant had endeavoured to avoid service, and that in consequence thereof he had pursued the mode of service which he had adopted, the appellant had nevertheless not endeavoured to avoid service, and had no notice of the summons in fact. The Judge reserved for the consideration of the full Court, not the whole matter of the appeal, but the mere point of the sufficiency of the service in view of the law, and of the facts then so before him, which facts were submitted to the Court. The Court by rule of 14th *January*, 1868, ordered the case to be argued before a Judge at Chambers, upon the case stated by the presiding Judge with the facts so submitted by him, and also the affidavit of *Johnson* made subsequently to the submission to the Court at *Halifax*, and directed affidavits, if made thereafter, to be heard in reply. Affidavits of *Elizabeth Rockwell* and *Ann Conrad* were accordingly made and heard before the learned Chief Justice at Chambers. He, on the 25th *February*, 1868, ordered, (and this was an inadvertence,) the rule *nisi* of *January* 14th, 1868, (as it was called,) to be made absolute with costs. From this order the appellant appealed on the 13th *March*, 1868, stating seven grounds of appeal, and among others that the order absolute was irregular. On the 31st *December*, the last mentioned appeal was brought before the Court, and a rule was granted by the Court. The learned Chief Justice sitting at Chambers, by an order dated 25th *February*, 1868, signed *nunc pro tunc*, 31st *December*, 1868, reciting the reading of the order of Court of *January* 14th, the case stated by *Wilkins, J.*, the affidavit of *Johnson*, and the affidavits in reply to

the same, and on argument without noticing the rule of Court of *December* the 31st, ordered the original judgment herein for plaintiff given by the Justices before whom the cause was originally tried at *Wolfsville*, to be confirmed with with the costs of trial and argument. If it was competent for the learned Chief Justice to make this last mentioned order *nunc pro tunc*, as I think it was, I am nevertheless of opinion that the order, so far as it confirmed the original judgment, was *ultra vires*, and that judgment could only be given by a Judge presiding at *Kentville*. The cause remains where it was when the Judge sitting at *Kentville* directed a preliminary point connected with it, and that only to be submitted to the full Court. That point has not yet been determined by a Judge at Chambers, pursuant to the rule of Court referring it for decision to such Judge. Either it must be decided regularly at Chambers, or, as I incline to think would be the better course, the rule of Court so referring it should be rescinded, and the question submitted by the presiding Judge decided by the Court. It has already been fully argued before the Court. When it is decided, the appeal from the justices could be determined at *Kentville*. I think the *nunc pro tunc* order of the learned Chief Justice should be rescinded without costs.

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### GARDNER v. HOME & COLONIAL ASSURANCE CO.

A SUB-AGENT of a fire insurance company has an implied authority, in the absence of notice to the contrary, to receive renewal premiums, such a power being indispensable to the carrying on of the business.

A sub-agent having received a renewal premium, and given a receipt therefor, but accidentally omitted to remit the premium and notify the general agent, and the premises having been subsequently destroyed by fire

*Held*, that the insured was entitled to recover.

YOUNG, C. J., now, (January 23rd, 1871.) delivered the judgment of the Court:—

This was an action on a policy of fire insurance made by the defendants through their agent in Halifax, *Mr. Wyld*, 9th July, 1865, and expiring 21st June, 1866. On the 26th May, 1866, the agent sent the usual printed notice to his sub-agent, *Mr. Owen*, at *Yarmouth*, addressed to the assured, who paid *Mr. Owen* the premium for renewal on the 21st June,



and took his receipt with a note of the entry on the face of the notice. This payment was accidentally omitted by *Mr. Owen* to be notified or included in his remittances to *Mr. Wylde*, and in *August*, 1866, the defendants withdrew their business in this Province. On the 4th *June*, 1867, the house and property insured were destroyed by fire, when it first became known to *Mr. Wylde* and to the Company that the premium had been paid to *Mr. Owen*. The defendants refused to pay the loss, and a writ was taken out 29th *July*, 1868, and served on the defendants in *London*, under our *Practice Act*, on the 28th *August*. The writ set out the policy nearly in the form in *Bullen & Leake*, 191, averring a fulfillment of all the conditions in the policy, and rendering it necessary, as we think, for the defendants under our chapter 134, sections 75, 91 and 92 to set out in his pleas any of the said conditions on which they may rely and the breaches thereof. Our section 92 having abolished the general issue, the great variety of defences which it authorizes in *England* and the Courts of the *United States*, as set out in *Hughes on Insurance*, 473, and in *Philips on Insurance*, sec. 2027, must be pleaded here, and the trial will be confined to the issues so raised. In this case the pleas filed 5th *December*, 1868, were: never indebted; a denial of the promise and of the loss; a denial of the renewal, with an averment that the policy had expired, and that the defendants had not become insurers as alleged.

On the trial the facts above stated and the good faith of all the parties were clearly established, and the only points that arose upon the argument, as suggested by the trial, were first, the authority of *Mr. Owen* to receive the premium, and its effect upon the Company under their third condition, declaring that "no receipts are to be taken for any premiums of insurance but such as are printed and issued from the office, and witnessed by one of the clerks or agents of the office;" and, secondly, the fact that the action was brought more than twelve months after the loss, contrary to the 16th Article.

Had the last objection been pleaded, it would have been difficult, perhaps impossible, for the plaintiff to have got over it. He might have replied, perhaps, a waiver, or have raised an argument out of the absence of the defendants and the

difficulty in serving them; but we need not take into account these possibilities, because it appears to us that the 16th condition above all others, being in the nature of a defence under the *Statute of Limitations*, should have been put upon the record by plea. See 2 *Phillips on Insurance*, 645-652; *Mason v. Harvey*, 20 L. & E., 541; *Cochran's Reports*, 21, 22-30; *Thomson's Reports*, 177; *Bullen & Leake*, 618.

The first objection is of a far more important kind, and if upheld would affect the security of parties insured through their agencies in this Province to an enormous amount.

The propositions urged upon us at the argument, that a general agent cannot delegate his power and extend the personal confidence reposed in himself to the persons he employs throughout the Province, must be at once conceded. It cannot be pretended that these persons, by whatever name they may be called as sub-agents or otherwise, can accept risks or settle losses. But when a risk has been taken and the insured is invited by the Company, as in this case, to pay the premium and "to bring the notice when renewing," and, in compliance with that notice, pays the premium in due time to the resident sub-agent and takes his receipt, it is a very important matter to determine, whether he is then insured,—whether the Company can afterwards refuse or neglect to hand him the printed receipt in their conditions,—or if the recipient of the premium accidentally or designedly omit to forward it to the general agent, whether the office can shake themselves free of the liability. All this is now contended for, and if it be the law it will strike a blow at all fire insurance transactions out of Halifax, and, when known, will paralyze the business of the numerous companies who are taking risks in every county of the Province. It is obvious, then, that a delegation of the powers of the general agent to his sub-agents for certain purposes, is indispensable to the carrying on of the business, and among these purposes must be reckoned the receiving of renewal premiums in the absence of any notice to the contrary, and still more where there is a notice inviting the payment. Other like purposes, which will readily suggest themselves and are referred to in the note to 1 *Parsons on Contracts*, 71, we forbear from stating. *Story on Agency*, 2nd edition, section 14, says: "There are cases where the

authority of an agent to delegate his authority may be implied as where it is indispensable by the laws to accomplish the end; or it is by the ordinary course of trade; or it is understood by the parties to be the ordinary mode, in which the particular business would or might be done. Thus an agent to sell may employ an auctioneer, and a shipmaster a broker." And to this, we think, may be added, that for the above purposes an insurance agent may employ sub-agents in the country. So in section 77: "The usages of a particular trade or business may be proved for the purpose of interpreting the powers given to an agent; for the means ordinarily used to execute the authority are included in the power, and may be resorted to by all agents, and especially commercial agents." And see sections 85-97.

In the case of a sub-agent receiving a renewal premium, these principles apply the more strongly, because, according to 2 *Kent's Commentaries*, 856, note (9th edition), "It seems that if a sub-agent be employed by the agent to receive money for the principal, or if such an authority be fairly implied from the circumstances, the principal may sue the sub-agent for the money, treating him as his own agent." 1 *Peter's Rep.*, 25.

The correspondence put in by the defendants in this case affords a striking example of the danger and the gross injustice of applying to this branch of business the unbending and strict maxims contended for at the argument. It appears by *Mr. Wyld's* letters of 22nd and 25th June, 1866 to *Mr. Owen* that he had run out of policies and he issued provisional receipts to serve until policies came to hand. Now strictly speaking, the Company were not bound under these receipts, yet, their agent having received the premiums, if a loss had occurred, what would have been thought of them, if they had raised such a defence and contested their liability? In point of morality, and as we think, of strict law as well, the present defence is much of the same character.

It happens that by the last mail I received the *London Law Times* of 31st December, 1870, containing an article on this very question of the powers of agents for fire insurance companies. It was called forth by a recent decision of the Supreme Court of the State of *Illinois*, of which the editor

disapproves, and this periodical is conducted with so much of legal ability and knowledge that its opinions are always worth the studying. "The law," it says, "as to authority of general agents, is the same in *America* as in *England*. Therefore, all that remains to be inquired is, whether there is anything peculiar in the position of the agent of an insurance company. It is to be observed, that by giving agents an authority to receive proposals for insurance against fire, which are not even to have an interim effect, as they have in *England*, (observe as they have in *England*,) the party insuring would be prejudiced. But this is met to some extent by the *American* Courts, who say that an insurer would contemplate a delay, and that a reasonable time to accept or reject the risk should be allowed to the Company. But it seems to us, that if an office gives an agent power to accept the premiums, it also gives him power to make representations as to the period when the policy comes into force and the protection he is to receive. And in the *American* case it appeared to be the practice of the office to issue policies taking effect from the date of the application (just as it was the practice of these defendants). This strengthens the view that in such a case agents have implied authority to secure an interim protection. And as we have said, the deposit acknowledgment secures this in *England* for a definite period." How much more, then, ought the *bona fide* payment of a renewal premium at the instance of the general agent to give protection from the time of such payment.

It is perfectly obvious, says the *Times*, that if insurances are to be satisfactory to the public, there should be no attempts to wriggle out of engagements by the agents who obtain insurances and the payment of premiums on the faith of their representations.

The defendants have abandoned the insurance business in this Province, and to them the results of this suit, beyond the amount at stake, are of no consequence. But we are satisfied that we are subserving the true interests of other companies still insuring, as well as of the plaintiff, in holding that he is entitled to recover under his policy and the renewal receipt signed by *Mr. Owen*, and, therefore, we give him judgment under the rule, with his costs.

## CONLON ET AL. v. THE CITY RAILROAD CO.

The Halifax City Railroad Company was bound by its charter to keep its rails on a level with the roadway. The rails were not so kept, and damage having resulted to plaintiffs using the streets with their horses and carriages.

Held, that plaintiffs had a right of action against the Company which was not defeated, although the course adopted for avoiding the damage might not be the best, provided the efforts to escape injury were earnest and sincere, and not grossly inappropriate. Also, that authority given to the City Council to supervise and direct the repairs of the railroad was merely directory and not of such a character as to affect the right of action of individuals injured directly against the Company.

Doss and WILKINS, J. J., dissented.

JOHNSTONE, E. J., now, (January 23rd, 1871,) delivered the judgment of the Court:—

This was an action tried before Mr. Justice *Wilkins*. It was brought up on a rule *nisi* to set aside the verdict for defendants, [taken under the statute,] as being against law and evidence, and for the improper admission and rejection of evidence, and as being against the weight of evidence, and for misdirection.

The action was for damages sustained by the plaintiffs, their carriages, horses, and servants, in consequence of obstructions placed by the defendant, and the careless driving of their cars in the streets of Halifax. I may distinguish the declaration as containing four grounds of complaint: 1st, obstructions generally; 2nd, obstructions by rails laid above the level of the street so as to interfere with the passage of vehicles; 3rd, for not keeping the street in repair in terms of the act which authorized the defendants to construct the road, and, 4th, careless driving of defendants' cars.

The pleas are: 1st, denial; 2nd, the Act of the Company's Incorporation, and that the rails were laid and the acts complained of were done under its authority; 3rd, that the injuries arose from the want of reasonable and ordinary precaution and care on the part of the plaintiffs and their servants. There is no replication as regards the complaints of obstructions from iron rails, etc. Generally the plea of the Act of Incorporation is sufficient and conclusive, the plaintiffs not being at liberty to depart from their count by shewing that although the defendants might lay rails they had not laid or maintained them at a proper level. As regards the complaints founded on the neglect of the defendants to con-

form to the restrictions of the act, the declaration is loosely drawn. The pleader has not sufficiently observed the principle that in this action the plaintiffs have nothing to do with the neglects or omissions of the defendants, except as these were the cause of injury to them, and that they were bound to shew clearly the relation between the cause and the effect, and also that the effect was not occasioned by their own default. Their averments should at least have negatived the possibility of the injuries having been occasioned by the driving of the plaintiffs or their servants wilfully or carelessly against the obtruding rails. The plea supplied this deficiency and put that fact in issue. The complaint of injury from unskilled driving of the defendants' cars rests on a different matter of evidence.

On the trial the testimony adduced by the plaintiffs shewed a great number of injuries sustained by their carriages, horses and servants by reason of contact with rails of the defendants obtruding much above the level of the street; and in some of the instances—perhaps in all—there was, I think, sufficient evidence from which it might be inferred that the collision was not the effect of the wilfulness or carelessness of the drivers, but it is strange that the witnesses generally were not brought to this point *distinctly* either on their direct or cross-examination. In two respects the plaintiffs' case, however, was liable to severe observation. In no instance was any injury brought to defendants' notice until long after its occurrence, so that they had not the opportunity of ascertaining and proving the state of the rails at the particular time and place; nor of investigating the circumstances under which the collision took place; nor of ascertaining the real amount of damage. The hardship and injustice to the defendants from this cause are so great that it may be a subject for just regret that the law does not allow the want of notice to be a ground for dismissing the case.

Then the credibility of some of the statements made in the plaintiffs' case is weakened by their extravagance. Carriages of various descriptions, driven at the slowest pace, are represented as falling to pieces on mere contact with the rails;—wheels, springs, axles and body involved in one general ruin.

If the plaintiffs' case met every possible requirement for giving it the fullest scope, the defence lacked nothing that could be demanded for a full and perfect answer on the facts in every particular, although one accustomed to drive along the streets of the city might perhaps be surprised to learn from this evidence that the rails had been universally kept at the proper level.

But on the whole a jury might well be justified, under the circumstances I have alluded to, in bringing the plaintiffs' testimony down to its minimum and giving to the defendants' a liberal construction if they did not go to its full extent. And, as far as the question before us turns on the evidence in relation to the facts connected with the condition of the rails, there is not, in my opinion, any pretence for interfering with the verdict.

It was objected on the part of the defendant that the 7th section of the act of incorporation, which requires the roadway to be kept in thorough repair within the track and three feet on each side, was not so associated with the previous section, which requires the rails on the formation of the road to be laid even with the pavement as to make it incumbent to keep the rails ever after at that level. I do not concur in this view,—it is a railroad level with the street that is to be kept in repair,—and I think the defendants, when they accepted their charter with this requirement, as much bound themselves to continue the rails ever after at the level on which they engaged to lay them at first, as if it had been so expressed in words. The construction appears to me so clear as not to require the aid of the rule which construes a doubt in favor of the public right.

It was argued that it was impossible to do so without paving, and paving would involve an expense equivalent to the destruction of the enterprise. This may be hard; but the law is too clear to be doubted that an impracticability of such a character does not release from an obligation assumed or imposed by the act of the party himself.

An objection that goes to the root of the action was raised. It was said that recompense for an injury for the default of the railroad must be sought from the city, and two reasons were given; one that the act of the Company's incorporation

requires the repairs to be made by the Company under the direction of such competent authority as the City Council may designate; the other that the city incorporation act imposes on the city authorities the duty and gives them the power of keeping the street in repair and removing obstructions. And in support of this view the case of *Currier v. Inhabitants of Lowell*, 16 Pick., 174, was cited. But that was an action against the town and not against the railway company, and seems to have turned on a law which made towns liable to travellers. It is true that the learned Judge said that the liability of the railroad corporation was immediately to the selectmen of the town, and again, he said the remedy for the traveller was immediately against the town upon which the liability is imposed by the statute.

If this judgment went, as it appears to have done, on a particular statute, it has no application to the present case; but independently of this, I do not think it follows that because an action lay against the town, therefore there was no alternative of action against the railroad company, unless the act alluded to restrained the common law right.

The case of *Evans v. City of Halifax*, 1 Oldright, 111, shews that the remedy against public authorities is much more restricted than against private wrong-doers; therefore, to limit the remedy of parties suffering from neglect of the railroad company to action against the city, would be, practically, very restrictive of the common law right of the subject, for which I can imagine neither maxim nor principle; and such a rule would lead to circuity of action without any necessity in cases where the city would have a remedy against the railroad company.

The authority given to the City Council to supervise and direct the repairs of the horse railway is but directory and confers no power to alter or modify the law. Its plain intention is but to see that the law is carried out, and were the City Council or its officers to sanction a projection of rails above the level of the street, the law would be paramount, and the railroad company would, I think, find that the act of the City Council afforded it no protection against the claims of those who suffered in consequence of this deviation from the obligations they assumed when they accepted their charter.



As little can the general authority of the City Council over the streets preclude the right of action against an individual who had incumbered the street to the injury of another, Suppose such an injury as was sustained by *Mr. Evans* to have arisen from the act of a wrong doer against whom the injured party brought an action, and that he was to be told that the city had charge of the street and were alone answerable for incumbrances on them, would such a decision in that case, with the decision in the case of *Mr. Evans* on the other hand not look like a mockery of law and justice?

I can imagine no assignable reason for this inverted mode of procedure contended for by the defendants' counsel at the argument. It appears to me to strike at fundamental principles, and that it would only be productive of inconvenience, increased litigation, and defeat of justice.

In looking through the heads of cases given in *Abbott's Digest of the Law of Corporations*, I see nothing that indicates that the Courts in *America* throw such a protection over the wrongful acts of railroad companies. They are protected while keeping within their legal restrictions, but when exceeding them, are answerable immediately to the parties injured. This may be seen from the notes of two cases—each against a railroad company. *Abbott on Cor.*, p. 650, par. 438: A railroad having the right to lay their track through a public street are liable to persons injured by the obstruction of the street only for an illegal use of the street. *Lackland v. North Missouri R. R. Co.*, 31 Mo., 180; and in a note to the case it is said, where the ordinance of a municipal corporation provided for the construction of a railroad through the corporation limits on either of two streets under various restrictions as to grade, etc., to be subsequently regulated; held, that the city thereby vested, so far as it could, the right in the corporation to run the road along the street, but in such a manner as not to obstruct the street for the adjoining proprietors, and with the condition that the road should be constructed on the existing grade of the street unless some alteration was made, within the power of the city by municipal regulations. Ind. Sup. Court, 1856,—*Tate v. Ohio & Mississippi R. R. Co., Ind.*, 7479. This last case is very

applicable, and the repeated reference to the limited power of the municipal corporation is significant.

There are several objections taken to the admission and rejection of testimony which I shall not consider, because, although some of them might be strictly sustainable, they have not, I think, the importance which the plaintiffs' counsel attached to them, and cannot affect the decision of the question before us.

I turn to a part of the learned Judge's charge with which I have unfortunately been unable to concur. While admiring the eloquence and force of the learned Judge's charge, I cannot think that he adequately appreciated the defendants' liabilities, or that the plaintiffs' testimony was presented to the jury in as free and unfettered a manner as was necessary for their just consideration of it.

I have expressed my opinion respecting some defects in the plaintiffs' case and as to the view the jury might have fairly taken in contrasting the testimony on both sides; but that must be taken subject to this condition, that the jury had the evidence of the plaintiffs put to them without undue trammels. Without this, the opinion of the jury is of no force, and it is by their opinion and not by that of the Judge on the trial or of the Court now that the facts are to be decided. I think the learned Judge tied up the jury too strictly on the point of the care and skill necessary to be proved to entitle the plaintiffs' evidence to consideration, and this is essential now because we do not know on what branch of the cause the verdict was given.

It is undisputed that a plaintiff cannot recover damages for self-inflicted injuries if he wilfully runs into danger which he might have avoided, or if he does not possess the knowledge and skill ordinarily necessary for the management of a horse and carriage in crowded streets and so gets into danger which with ordinary skill might have been avoided. Plaintiff has no claim for damages on this point, and in relation to the present case, I would make a distinction between collision with the rail cars and injuries from contact with the rails. The cars are running under sanction of law, and drivers of vehicles must keep off the track, or if on it, must be on the watch to get clear in good time; although this will

not authorize the driver to run them down, if their movements are obstructed by surrounding vehicles, or by obtruding rails. The case of contact with rails is different. They obtrude against the law, not under its sanction. The Company are required to have their rails level with the street or pavement so as not to hinder the passage of vehicles. Here the obligation of care and skill is not of so strict a nature as in the former case. And, for this reason, that in this one case the opposing force moves under the operation of the law, and in the other the obstructing cause exists in violation of the law.

In two particulars I am obliged to differ on this head from the learned Judge. No effect appears to have been given to the fact that if the rails projected they did so contrary to law. The jury were told that the plaintiffs must shew, even if the defendants had neglected their duty by allowing their rails to project above the surface of the roadway, that when the injuries happened, they (the plaintiffs) were exercising their right of traffic with their vehicles with care proportionally greater than that which the law would require of them when driving over a street in which no railway existed, inasmuch as the risk of injury is greater from the nature of the circumstances in the former case than in the latter. Bearing in mind always that degree of inconvenience, and that wear and tear of carriages which this legislative charter necessarily supposes every subject must submit to, because the law has subjected him to it, I think this instruction was calculated to mislead the jury into supposing that the law had imposed restrictions on the common law right of the public which, in my opinion, it had not imposed; the legislative charter of the defendants contemplated an even surface, and, therefore, the law imposed on the public no greater inconvenience either in relation to the strength of carriages or the care in conducting them, than was incident to an even surface, the additional inconvenience and risk resulting from a projecting rail being not only not contemplated but prohibited by the act. And, further, I am obliged to differ, because I think that independently of the objection I have just mentioned, the learned Judge required a larger measure of care and skill than the law imposed on the plaintiffs. The language of the

charge is: "Surely it would be revolting to that common sense view of this case, which I am persuaded you, in view of the law, as explained by me, and of the evidence presented to your own minds, will take of it.—to establish by your verdict that, in order to entitle these plaintiffs, as against these defendants, to compensation for these injuries, nothing more was required of them than to prove, as they have proved, that their carriages, in good repair, moderately driven over the rails of the defendants, came into collision with those rails, on which, however, the defendants were safely driving their cars daily, and over which hundreds of our citizens were driving every day without injury, and that from such collision the injuries resulted. That same common sense view demands, as the law requires, that such an action cannot be sustained without at least proving, to the satisfaction of a jury, that not only were the plaintiffs exercising the required care, and their vehicles strong enough to encounter necessary and inevitable collision with the rails, but that in the absence of all fault on the part of the plaintiffs, the injuries resulted solely from the cause of "the pavement or other surfaces of the roadway," at the time of the injuries, "not having been kept in thorough repair by the Company." And, here, appealing to your common sense, I put it to you, whether the proof that the plaintiffs have given, even unopposed, comes up to the requirement of the law, which I have just indicated. Does it establish that, at those times, the surface of the roadway was not in a condition to satisfy the 7th section of the statute?"

Now this might be legitimate as to the question of the plaintiffs' witnesses; but I cannot concur where it is given as a measure of the nature and degree of the required evidence, nor can I concur in the idea that collision with the rails was a necessary and inevitable condition imposed on the plaintiffs. But it is especially when the learned Judge intimated to the jury that the plaintiffs' evidence, even unopposed, did not come up to the requirement of law, which the learned Judge had intimated to the jury that it is seen how greatly the view taken by the learned Judge differs from that which I have ventured to adopt.

This will be seen by referring to the minutes. A great number of witnesses swore to the rails being some inches

above the level at various times and places,—to the damage having been occasioned in different ways and under various circumstances, fully described, and when the driving was moderate. To extract their testimony would be to transcribe pages of the minutes. One or two references will suffice in addition to this formal observation :

*William Conlon* said : “ Long pieces of iron on wood, half an inch thick and ends sprung up. It was on inside rail. My wheel caught it and snapped springs off and forward part fell down. That bar was to be seen every day, and stuck up and caught the wheel.” This is one out of many instances of injury alleged by the witness to have happened owing to the elevation of the rails, which I have selected on account of the close application to it of an authority I will presently notice. This witness had sworn that his habit of driving was slow.

*Baker* says : “ I was going north, cars before and behind. Wheels caught on rail, dragged four or five yards and broke wheel to pieces ; walking, and three ladies in cab. I had drawn off to let one car behind pass, and then turning to avoid the other the result happened. I looked at rail. It was above the street between three and four inches. I could not by any care have avoided the accident.”

The question is not whether the plaintiffs' evidence was true or false ; the question is whether, if true, it was sufficient. The law I alluded to is *Abbott's Digest of the Law of Corporations*, p. 651, sec. 440. A person driving in his carriage along a city railroad track and injured by the projection of a spike which the the Company ought not to have permitted, may recover from the Company, although there was room in other parts of the street for him to have passed. *N. Y. Com. Pl.*, 1861. *Fash v. Third Avenue R. R. Co.*, 1 Daly, 148.

There is one other piece of the plaintiffs' testimony that I refer to, because it depends on a different principle, and is free from some objections made to other parts of the case. B—— proves a damage from collision with a car. He says : “ I was in an express waggon of plaintiffs' with a load of hay. A car of defendants' came down on me and smashed me all to pieces. Nobody was driving car. \* \* \* Car struck forward wheel. Had not time to get out of the way. I tried

my utmost. I was stopped from turning by a rail I could not get over. I was thrown off road. If the rail had been level I could have got across it in time. It was about half way up the hill—(the defét hill). I saw driver running after the car trying to catch the horses."

I cannot conceive that the testimony I have quoted, and much more on the minutes of the same nature was not amply sufficient, if unopposed, to support the plaintiffs' case. Indeed, if this evidence was not sufficient, I know not how stronger could reasonably be expected; and were this verdict to stand with the evidence on the one hand and the charge of the learned Judge on the other, I cannot but think, and I differ from the learned Judge with the greatest deference, that a principle would be established which the case does not warrant and which would be most detrimental to the rights of the public.

I think the Company are bound to keep their rails on a level with the roadway, and if they are not so kept and damage results, the individual injured has a right of action against them which is not defeated, although the course adopted for avoiding the damage might not be the best, provided only the effort to escape was earnest and sincere, and not grossly inappropriate.

The interests under review are important. The value and convenience of the horse cars to large numbers of the citizens are unquestionable; the free and secure passage of the streets by vehicles of every description is still more so, affecting society in more various and numerous aspects, and having in law a broader foundation. There is no necessity for, nor should there be hostility or antagonism. It is the duty of any citizen, on all occasions and so far as may be in his power, to avoid delaying or obstructing the cars and carriages of the Company, and the Company owes it to the public and to the law to maintain the roadway at the prescribed level, and when that has not been the case and damage has been the consequence, to render to the individual injured a fair recompense. I do not mean to imply censure for resisting this action under the circumstances I have before alluded to, nor, on the other hand, would I venture to intimate, in the face of the numerous witnesses—some of them apparently without interest—who

testified in favor of the claims, that the plaintiffs have not any title to remuneration. This, indeed, is not a question before me, yet there is enough in the case to make me regret the necessity of protracting this litigation. I may add that the laying down of a double track in streets too narrow for that accommodation was greatly to be deprecated and has led to most of the inconveniences complained of, and no doubt has thus been the occasion of hostility against the Company; and it is not to be denied that the Company in accepting the double track and thereby multiplying the occasions on which it would be necessary for vehicles traversing those streets to use their roadways, enhanced their obligation, and made the necessity more stringent that the level of the street should not be disturbed. It is not, however, against the Company especially that the citizens have this cause of complaint, seeing that the forethought and knowledge of the City Council, on which they had a right to depend for the protection of their interest proved unequal to the duty imposed on them when they permitted three principle thoroughfares—Water street, and Granville and Hollis streets—already hardly affording more width than was required for the existing amount of traffic and passage, to be occupied by a double track; although it could not fail to interfere to an unreasonable extent with the ordinary uses of the streets, and in some places very inconveniently to abridge the space between the rails and the side-walks.

I shall regret if the decision arrived at by a majority of the Court shall lead to increased litigation affecting interests so important and which demand for the common benefit a large measure of mutual forbearance and consideration. But I think a just protection of the public rights imperatively requires that the rule for a new trial should be made absolute, and there does not exist any reason why the ordinary practice as to costs should be departed from.

YOUNG, C. J.—Although the subject matters of this action have been amply discussed by the learned Equity Judge in the opinion he has just delivered, I think it necessary, in a few sentences, to state the results to which my own mind has come, where the conclusions are so important to the community, and so largely affect its interests and its safety.

The main question is the true construction of the Act of Incorporation, 26 Vic., chap. 83, secs. 5, 6 and 7. In what spirit we are to deal with it may be learned from the case of *Parker v. Great Western Railroad Company*, 7 M. & G., 253. "It is to be observed," says Chief Justice *Tindal*, "that the language of these Acts of Parliament for the incorporation of railways is to be treated as the language of the promoters of them. They ask the Legislature to confer great privileges upon them, and profess to give certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public." We were told by the defendants' counsel that foreign capitalists were invited by the Government or the Legislature to come into the Province and construct this work, and were reminded of the blessings it had conferred on the community. Now I am by no means disposed to undervalue these. The railroad has been and is an immense convenience to the general public, comprehending all classes, and its failure or withdrawal would be justly regarded as a calamity. Still, I cannot help thinking that had its practical working been as well understood as we have learned from experience, it would never have existed on our principal streets with a double track as it now is. It has conferred large benefits on certain classes, to the signal inconvenience and loss of other classes equally entitled to the protection and care of the Legislature. We must look upon the Act, therefore, as a contract,—binding the public, whether it will or no, upon the one hand; binding the corporation, whether it will or no, upon the other. I must confess I read the evidence for the defence, as well as much of that of the plaintiffs, with astonishment. It would seem from some of the principal witnesses and employees of the Company, that on the part of the public there is not, and never has been, a grievance. The rails, according to them, have always been level with the surface. There have been no obtruding points, twisting the wheels or dislocating the axles,—the conditions of the charter have been always amply obeyed. There was a large mass of evidence, to be sure, on the other side, which does not appear to have been much thought of, and I must add that on this Bench there is a clear remembrance of many serious accidents



which are not at all reconcilable with a smooth and unbroken surface. The theory of a trial used to be, that a Judge was to know nothing that was not in proof before him, and was to ignore the things most familiar to his thought, unless they were in his note-book. I have never accepted this theory myself, and was happy to find an authority the other day, which justifies me in qualifying if not rejecting it. "Judges," says *Coleridge, J.*, a man of acknowledged talent and of liberal thought, "are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early times." Now to deliver a judgment in this case upon the assumption that the rails, although they may have been laid, have been always kept level with the surface, would be to affect the unreal ignorance of which I am neither an admirer nor an advocate. The point of the case is, are the defendants bound by the terms of their charter to keep their rails at all times level with the street, whether the City Council do or do not require them to be so kept. The words of the seventh section are, that "the pavement or other surface of the roadway is to be kept always in thorough repair by the Company within the track, and three feet on each side thereof." What is the meaning of thorough repair? The defendants' counsel say it has nothing to do with the rails,—that if the track within them, which the horses travel, and three feet on each side of it, be in perfect order, the rails themselves may protrude to any extent without violating the charter. In other words, they may be in such a condition as to render a passage across them hazardous or impossible, and if a carriage attempts it and is damaged or broken, there is no liability on the part of the Company, and no redress to the owner. Such a construction appears to me to involve a perfect absurdity, and looking to the objects and scope of the Act, and reading the three sections together, as we ought to read them, I have not a doubt that the Company are bound to keep at all times their rails, as they were laid down, level with the surface of the street, so that carriages can safely and smoothly pass over them.

Two considerations of great moment here present themselves. It has been truly said that as the roadway was laid

down and has been kept in repair under the eye, if not under the direction of the authorities designated by the City Council, it is impossible at all times to keep the rails so level. A temperate and well written letter was addressed to the public by the Manager, in *January*, 1869 containing the same arguments urged upon us by his counsel, which I have attentively considered. It is said that owing to the great elevation of the city on the western side, the water pours down upon the track, and with every heavy rain the roadway sinks, and, although this is not added, the rails of course rise above the surface. To make the Company liable for accidents under these circumstances seems a harsh and unjust thing, and when they are in proof, a Court and jury should always give them the most liberal consideration; they do not affect, as I think, the absolute right of a complainant, but they would address themselves strongly to one's sense of justice, especially if instant efforts were made, as they ought to be, to restore the original level of the roadway.

But the true remedy lies deeper than this. I am perfectly satisfied that the railway never can be kept, as the public have a right to expect, until it is paved. A pavement is contemplated by the seventh section, but the Act does not require it. Here there is a fair opening as well as the reasonable foundation of a compromise. In the letter I have quoted it is alleged that the Manager offered the City Committee to pay all expenses of putting down block paving in and about all the tracks, if the material therefor were furnished by the City; and this offer was not accepted. It was made a second time for all or any portion the City Council might select, and should it be again renewed, I am decidedly of opinion that it ought to be accepted, and that the City Council should apply to the Legislature for the necessary powers. This, and this alone, will put an end to the unseemly strife we have so often witnessed,—to the irritation which has led to the exaggerated demands in this suit, and to the annoyances which the owners of carriages and other vehicles have undoubtedly and frequently been subjected to. This city, so rapidly expanding, and attracting more and more every year crowds of visitors for purposes of business and of pleasure, can no longer afford to have the traffic reduced to its present state, and every light

and elegant vehicle banished from its finest streets, or traversing them with eminent danger to the carriage and its inmates.

Before I close I must dedicate a few observations to the case from 16 *Pick.*, 170, which was cited for the defendants, and presents some remarkable features. No such action could be brought in this Province against a township, and on the principles laid down in the case of *Evans v. The City of Halifax*, 1 Oldright, 111, and in the *English* cases on which that decision was based, it would not lie against the City. The obligations of a town in *Massachusetts*, under the statute of 1768, chapter 81, which was republished in the Digest of 1836, and on which the case in 16 *Pick.* is founded, are much more extensive than any that are to be found in our City Charter. By the statute of 1786 "all highways, townways, causeways and bridges, within the bounds of any town, shall be kept in repair at the expense of such town, where other sufficient provision is not made therefor, so that the same way be safe and convenient for travellers, with their horses, teams and carriages, at all seasons of the year." With such an Act in force in 1834, I am not surprised that the Supreme Court of *Massachusetts* held the liability to attach in the first instance to the town. Whether or not the town had any remedy over against the persons that were employed in the excavation complained of is a matter, they remark, with which the traveller has no concern. His remedy, when injured in person or property, is immediately against the town, upon which the liability is imposed by the statute. In tracing the legislation of *Massachusetts* upon this matter, as far as the statutes within my reach would permit, I find that the Acts of 1851, chap. 85, enable the town against whom such recovery shall be had, to recover the damages and costs on both sides from the railroad corporation, if the corporation were liable for such damages and if reasonable notice had been given them to defend the original action, so that the action against the town becomes in fact an action against the corporation. So far from railroad corporations being discharged from liability, as we were told, it is further provided by the Acts of 1835-6, sects 78-to 81, *Digest*, 347, containing directions for the management of railways, that a corporation unreasonably

neglecting or refusing to comply with such requisitions, shall forfeit a sum not exceeding \$1000, and shall also be liable for all damages, in an action on the case, by the party sustaining such damage. And by the Act of 1837, chap. 226, sec. 7, whenever any engineer or other agent of a railroad corporation shall injure any person from negligence or want of care, he may be punished by imprisonment. Provided always, that the corporation shall still be liable in an action of damages therefor. It is apparent, therefore, that the decision relied on by defendants is at variance with our own decision in *1 Oldright*, which was also a case of excavation, and was founded on a statute, which, however admirable, we are by no means prepared for, and have never attempted to introduce into this country by any Act of the Legislature.

I have forbore from saying a word on the facts of the case, as they were fully discussed in the judgment we have heard. But as the view I take of the obligation of the Company differs so widely from that which the presiding Judge delivered to the jury, it follows, of course, that in my opinion there ought to be a new trial.

DODD, J.—I regret that I am obliged to differ from the two learned Judges who have preceded me. I quite concur with them as to the defendants being liable to an action of the kind brought, provided it is sustained by the evidence, and I am not prepared to go as far as the learned Judge who tried the cause, and hold that the action is not sustainable under any circumstances. The principal objection of the learned Equity Judge is to the charge. Now, the rule as regards a Judge's charge is, that if it has not a tendency to mislead the jury on an essential point, the Court will not disturb the verdict. Now the learned Judge who tried the cause, observed that the plaintiff was bound to exercise ordinary care and diligence to avoid accident. The jury found that he did not use such care and diligence, and that he would not be exercising ordinary care and diligence if he did not use a different description of carriages in crossing defendants' rails from those which he had used previously; that ordinary care and diligence in traversing the streets before the defendants' railway was constructed, required only the use of ordinary carriages; but that when the Legis-

lature stepped in and gave the defendants the right to lay their railway through certain streets, that ordinary care and diligence then required, as already stated, the use of a different description of carriages by the plaintiffs in traversing such streets.

I think that the question was fully and fairly submitted to the jury, and that they were right in finding as they did.

On reference to the testimony it will be seen that the plaintiffs alleged that, not one, but several accidents occurred to their vehicles, and yet no notice was given to the Company at the time they are stated to have occurred. If the plaintiffs had given notice to the Company at the time, they could have ascertained whether the accidents arose from their negligence, in not keeping the road in proper repair.

If I had been on that jury, I should have found for the defendant on that ground alone, because the plaintiff concealed the injuries until it was impossible for the defendants to ascertain how they occurred.

Under these circumstances, I think the learned Judge who tried the cause did right in admitting general evidence as to the condition of the rails, and I am not disposed to interfere with the verdict.

DESBARRES, J.—I have given to this case the best consideration in my power, and I concur in the judgment of the learned Equity Judge and the learned Chief Justice.

My brother *Dodd* states that he does not think that the charge of the Judge affected the minds of the jury. If I could satisfy my mind of that, I would, perhaps, come to the same conclusion at which my brother *Dodd* has arrived. I cannot say that I credit all the statements made by the witnesses for the plaintiffs. I should say, indeed, that their evidence was very much exaggerated, but I am not prepared to say that there was no truth at all in their statements. It has been said that there was neglect on the part of the plaintiffs in not giving notice to the defendants of the injuries alleged at the time they occurred. I do not approve of their conduct in that respect; but can we arrive at the conclusion that the railroad was, at the time the accidents occurred, in the condition in which under the law it should have been?

I do not travel much in carriages, but in walking across the streets traversed by the defendants' railway, I have found occasionally some little difficulty in preventing myself from stumbling over the rails. I consider that my learned brother who tried this cause did put his views in a most eloquent manner to the jury, and that he could not have done so without producing an effect upon their minds. The few words which he used at the close of his charge to the effect that they should take the case in their own hands would, in my opinion, have little weight after his previous observations.

WILKINS, J., said, that before reading his opinion he would notice one or two digested abstracts of decisions in railway cases which, while the learned Chief Justice was reading his opinion, had attracted his eye in *Abbott's Digest of the Law of Corporations*, lying before him. They did not comport with the views expressed by the Chief Justice. In *York & N. M. Railroad Co. v. Reg.*, 1 El. & Bl., 858, it was decided that railway charters are not necessarily to be regarded as contracts with the public, but as a grant of powers to be exercised upon the conditions fixed. In *New York Superior Court*, 1858, *Wilbrand v. The Eighth Avenue R. R. Company*, 3 Bosw., 314, it was decided that a City Railroad Company is entitled to the unrestricted use of its rails for the progress of its cars within that limit of speed which the law allows them, and the driver of any other vehicle who may be on their track is bound to use greater care than if upon the common pavement. And if through his negligence or wilfulness in this respect a collision ensues, he should not have damages against the Company, even though the latter are also in fault. His Lordship remarked in relation to this doctrine of a *United States State Court*, that he had at the trial of this cause announced to the jury a similar opinion, although he was not then aware of the decision to which he had just referred.

The learned Judge then proceeded to read his opinion as follows :—

Where a Judge has the misfortune to differ from a majority of his learned brothers, it is his duty to consider carefully their views and arguments, and to yield to them if they carry conviction to his own mind. But if they fail to do so he owes

it of course to the suitors, to the profession, and to himself unreservedly to express his own dissenting opinion. If in doing so, and supporting it may be in an important case a ruling or a verdict which a majority of the Court disapproves, he is obliged to point out as a necessary result of this antagonism of sentiment a state of things which is plainly repugnant to principle, he can only deprecate and regret that consequence. I make these preparatory remarks because I am obliged to demonstrate that while the judgment of the Court in this case is to set aside a verdict for misdirection, that verdict has been found upon an issue raised on a plea going to the plaintiffs' whole right of action, which is sustained to the very letter by unexceptionable and uncontradicted evidence so conclusive to establish the defence, that no matter how erroneous the Judge's direction may have been, there was no question of fact to put to the jury, and their verdict could only be for the defendant. I say this, of course, advisedly, and after the most careful consideration of the issue and of the testimony.

Before entering on the consideration of the case, I will quote two authorities for leading principles which, indeed, need no authorities. In *Mitchell v. Williams*, 11 M. & W., 205, it was decided that where a fact is distinctly sworn to upon a trial which is not contradicted by other evidence, and there is no doubt cast upon the credibility of the witnesses who attest to it, the Judge need not take the opinion of the jury upon it, though he may have been requested to do so. Secondly, *Chitty's Archbold*, (11th ed.), 1520: "An incorrect direction to the jury upon a point which could not have influenced their verdict is not a ground for a new trial."

In conducting the trial of this cause, I did not put the case to the jury on that which I then inclined to regard as a leading principle of the charter embodied in chapter 33 of the Acts of 1863. That principle would seem to be such a prescribed municipal control over the construction as well as over the maintainance and repairs of this railway as was intended to exempt the Company from liability to travellers in respect of injuries sustained from the condition of the roadway while they were using the highway, provided the original construction of it was approved by the City Council, and,

provided also, the pavement or other surface of it was kept within the prescribed limits in such a state of repair as should be from time to time directed by competent authority delegated by the City Council and by that authority considered to be in thorough repair. It could not of course be contended that there was any immunity on the part of the defendant Company from liability in respect of a wilful abuse of its chartered privileges, or of obstruction to travellers not within the scope of the charter consciously permitted by it to continue within the limits of its road after the notice of the existence of such. The language of sections 5 and 7 of the statute would seem to demand the construction supposed. I cannot conceive how, in view of that language, any liability of the Company to a traveller using the highway and suffering an injury when crossing the railroad track, can exist at common law or arise otherwise than from the proved neglect of the Company to perform that obligation in relation to a street in which their rails are laid which we find expressly imposed by the Legislature. See *Rex v. Pease*, 4 B. & Ad., 30; *Vaughan v. Taff Vale Railroad Co.*, 5 H. & N., 679, *per Cockburn, C. J.*; *per Blackburn, J.*, 688.

Public interests were quite as much contemplated as the private advantage of the incorporated Company when these chartered privileges were conferred. Provision is made in the statute to secure to the government an option to purchase and to take possession of the property and of the stocks of the Company, and the city roadway is connected with the Provincial railroad and has ever been used in that connexion. That the municipal authorities should have imposed on them by the Legislature the duty of protecting the citizens and the public from injury when using a street encumbered with this novel mode of transit by means of their requiring the Company to keep the roadway always in repair, while on the Company was to rest an indemnifying responsibility to the City Council for damages that a traveller might have recovered from the city for injuries sustained by him when passing a street in which the rails were placed, if these last resulted from the Company's neglect of, or disobedience to, the orders of the city authorities, appears to be in keeping with the relations of the municipality to the citizens and to the travel-



ling community. It is also in harmony with the then state of the law in relation to the streets of this city, not varying when the statute passed from what it is at present. At the time when this charter was given the law had imposed on the City Council an obligation to keep in repair and free from all obstructions the streets of the city by the agency of officers appointed to that special end. In the City Incorporating Act of 1864 we find provisions to the like effect. This last mentioned act passed before the occurrence of the injuries which are the subject of this action. Had they happened on the streets as they were before the horse railroad was made, from neglect of reparation thereof, or from nuisances permitted to be thereon, the remedy—the only remedy—would have been against the city. (See section 276 of the last mentioned act). Section 258 imposes the obligation to repair, etc., on the City Council or their committee. Section 274 gives the City Council all the powers of law vested in the surveyors of highways. Section 277 authorizes the appointment by the City Council of a Superintendent of Streets who, by section 278, under the direction and control of the Committee of Streets, has extensive powers as to repairs conferred on him. Section 284 places the streets and the expenditure thereon under the control of a committee of three aldermen, to be called Committee of Streets. Now it is very suggestive to the construction of the charter in question, that the Legislature has, in the statute that embodies it, required the agency and control over the streets to be subject to this railroad, of these very same authorities and officers by name,—of the City Council, the Superintendent of Streets, and the Committee of Streets. It is so suggestive also, that while the common law, from the very nature of the case, could imply no general liability of this chartered Company to travellers for injuries suffered while using a street burdened with the railway unless the charter was wilfully abused, the Legislature has not thought proper to impose any such liability in terms.

A *Massachusetts* case—*Currier v. The Inhabitants of Lowell*, in 16 P. & N., 174, was cited at the argument. It confirms the view of construction that I have expressed, unless the *Massachusetts* law respecting the control of streets (which is identical in substance and principle with ours)

differed from the law which in that respect governs the city of Halifax. The Court, in that case, in which the inhabitants of the town were sued for an injury sustained by a person travelling on the highway from an excavation made in it by a railroad company incorporated by the Legislature for the purpose of constructing the railroad, said, "the liability of the railroad corporation is immediately to the selectmen of the town in which the railroad crosses the highway." But the liability of the town to travellers remains as it was by the statute of 1876, chapter 81, section 1. (I have examined the provisions of the statute and compared them with our own city laws, by means of which our Legislature has protected the citizens against injuries when using the streets, and I find them identical as regards the principle and mode of the protection thus afforded, and as to the means of redress.) The Court of *Massachusetts* continued thus: The work (that of the Company) is to be done reasonably and properly to the satisfaction of the selectmen, and if it should not be so done, the selectmen may make the necessary alterations themselves and recover the expense from the railroad corporation. (Whether this recourse over on the part of the selectmen was or was not given by the Legislature is perfectly beside the question that we are investigating.) The common law would unquestionably give a like recourse to our City Council as a necessary and inevitable consequence of our express legislation. What lawyer could for a moment doubt that if the City Council had been made liable in an action by those plaintiffs for these same injuries complained of, and the City Council could prove that that recovery had been obtained against it as a consequence of this incorporated Company having disobeyed or neglected to perform an order to repair the roadway communicated to the Company by the City Council or its delegated authority, the City Council could legally demand an indemnity from the railway company. No legislation could be necessary in such a case. A right of action for indemnity would be a legal inference from a neglect on the part of the Company to perform a duty expressly imposed on it by the Legislature. The general liability of the City Council to a traveller suffering an injury from neglect to repair a street, or from knowingly permitting an

obstruction to remain in it would find an authority, if such was needed, in the recognition of such liability which is afforded by *Evans v. The City of Halifax*, 1 Old., 111.

A mere abstract of a decided case, given in *Abbott's* very useful work on Corporations, in relation to which we have not the case nor the statute to refer to would, for the purpose of an enquiry, have no weight at all. This would, but for another explanatory reference in that work which I shall notice, be illustrated by *Abbott's* reference to a case seemingly much relied on by the learned Judge in Equity. *Abbott* says: "A railroad company having undertaken to lay down their tracks along a street which is a public road is bound to lay it down properly and keep it in proper condition. Held, that where by the sinking of the pavement a spike in the rail was left exposed with which the plaintiff's carriage came in contact and the plaintiff thrown out and injured, the Company was guilty of negligence, and the plaintiff might recover." The force of this decision on our minds would of course depend on how far this defendant Company in the *New York* case was bound, if at all, by the Legislature, to keep the pavement from sinking so as to expose the spikes. While in ignorance of that the case can have no bearing on our inquiry. (Here the Judge remarked in reference to this spike case, that within a few moments he had ascertained, (as the language of *Abbott* would indeed import) that the rails in question were laid down in that case without any legislative authority, and, therefore, the case deemed so important was no authority at all. See *Abbott*, p. 65, sec. 432.) But whether this supposed immunity of the defendant Company exists or not, it must be taken to exist in view of the pleadings, the trial, the verdict, and all the subsequent proceedings.

It may possibly be held here after a motion for arrest of judgment, that the pleas on the record do not constitute a legal defence to the action, but until then it must be regarded as such. The special pleas going as they go to the very root of the plaintiffs' case, base the defence of the Company on the sanction of the City Council for all the acts imputed to the defendant, the consequences of which are complained of. All imputed neglects are denied. The plaintiffs have not demurred to either of the pleas, nor was the sufficiency of them in point

of law to raise a defence even questioned at the trial. The plaintiffs received and read them, and left (sec. 81 of ch. 134, *Revised Statutes*, to the effect that if a plaintiff does not reply he shall be taken to have denied the facts alleged in a plea) the statute by its operation to raise a traverse of them. They have therefore denied that the defendants' acts to which the plaintiffs ascribe the injuries, were done or permitted with the consent of the City Council.

It will be shown how completely the evidence sustains the defence. (Here the Judge read the three first connected special pleas *in extensio*.) The plaintiffs, as already intimated, have neither questioned the legal sufficiency of these pleas on the ground that notwithstanding any privileges or exemptions in the charter mentioned, the defendants were liable at common law ; nor assigned an abuse of the charter, or that the acts were done in excess of the chartered rights.

The pleas plainly answered the plaintiffs' case thus in effect, *viz.*, the roadway, the state and condition of which you allege to have been unlawfully such as to cause the injuries of which you have complained, was originally constructed and maintained by the defendant Company in accordance with the provisions of the charter contained in the statute and (as required thereby) with the consent and approval of the City Council, and the defendant Company has ever since kept the pavement or other surface of it within the prescribed limits in that state of repair which was directed by such delegated authority as the City Council deemed competent. "This," said the defendant, "is my answer to your complaint, and my defence in point of fact and of law."

The plaintiffs have replied : " We deny the facts on which you thus rest your defence."

I will now examine the evidence to see if it supports these defensive allegations. It entirely sustains them. *O'Brien* says : " I am manager of the Company. The road was built by me. I applied to the City Council by letter to appoint a person to superintend the road. *Pollock* and Street Committee acted in superintending. I built the road to their satisfaction." *Nash* proved that *Pollock* was the City Superintendent of Streets and that the horse railroad was originally built under the superintendence of *Pollock* as the Superin-

tendent of Streets. Again, *Nash* says: "*Pollock* acted as superintendent of the keeping of the railroad in repair." *Nash* says, further, "I acted as chairman of Committee of Streets in seeing this railroad kept in repair. I required certain things to be done by the defendant Company which were done immediately." In cross-examination he says: "The Street Committee were appointed expressly in reference to this city railroad repairs." *O'Brien* further says: "The whole City Council, after the road was built, inspected and approved of the road. No objection was made by any of them. The road afterwards was opened for public uses." Again, he says: "From the time of finishing the road *Pollock* and City Committee of Streets acted in the capacity of superintending repairs up to the time of certificate," (which certificate was granted about a year after the road was finished.) *Craig* also proves that *Pollock* acted as superintendent of streets, and under direction of the city. *O'Brien* adds: "The street committee for the time being have since superintended and directed me. I have always and at once obeyed their directions." Here let it be noted that this is absolutely uncontradicted. *O'Brien* further says: "At noon of 14th or 15th of *June*, 1866, the road was inspected by the city authorities. The next day it was opened for public use." *Pollock* died in *May*, 1868, and acted as superintendent of the streets at the time of all the grievances complained of by plaintiffs.

Here we have evidence abundantly sufficient to satisfy the allegations in the pleas founded on the requirements of the statute. If to contend that the City Council did not approve of the construction and maintenance of the line of railroad, because no record of that fact was produced, when it was proved and not attempted to be contradicted that the whole City Council, after the road was built, inspected and approved it, and that on a particular day named the road was opened by the city authorities, would be a contention without the support of law or of reason. There is not a word in the statute that takes the case in this respect under consideration out of the rule of legal inference of authority from public officers and bodies drawn from their acting as such. The written certificate of approval spoken of by *Mr. O'Brien* as

received by him a year after the road was opened, was entirely immaterial. If produced, it could not have affected or qualified the positive evidence of approval solemnly given at anterior periods after the road was finished.

One of the objections taken to the Judge's ruling was that he did not require production of *O'Brien's* letter, whereby he applied to the City Council to appoint a person to superintend the road. It is perfectly immaterial what the form of his application was, or whether he applied at all. The charter did not require the Company to apply. The law appointed a particular officer to superintend. The Company was superintended and directed in fact by the city officers under circumstances which necessarily imply their full knowledge, and it had the approval of the City Council and the city authorities in fact. But these defendants—a chartered Company—had nothing to do with the question of evidence furnished by the records of the City Council, over which, or in respect of the regularity of keeping which, the defendants could have no possible control. Whether a "Committee of Streets," or a "Superintendent of Streets," or the "delegated authority," referred to in section 7, were duly constituted or not, or whether the records of the City Council show or do not show such appointments, concerned the defendant Company not at all. The Company looked to the fact of acting by such authorities respectively in relation to it and to their acts alone. This consideration also disposes of the objection that the Judge refused to receive as part of plaintiffs' proffered evidence the two volumes of records of the City Council. Had they been received, and had the Court and the jury devoted to their examination the time that would have been required therefor, and discovered that they contained no entry of the appointment of *Pollock* as Superintendent of Streets, that discovery would not, on the plainest principles, have annulled *Pollock's* acts as Superintendent of Streets and the presumptions which the law attached to his acts. Evidence of acting in a public office raises a presumption that all the formalities necessary to be completed to authorize such acting have been complied with. *Dexter v. Hayes*, 11 Ir. C. Co. R., *Fisher's Digest*, 3579; *Sichel v. Lambert*, 15 C. B., N. S., 781; See *Bristol (Governor, &c.) v. Waite*, 6 C. & P., 591. In eject

ment by Churchwardens and Overseers, proof that they have acted in that capacity is sufficient, without proof of their appointment. *Doe d. Bowley v. Baines*, 10 Jar., 520; *Fisher*, 3580. See also as to acting in an official capacity in a land tax assessment. *Doe d. Hoply v. Young*, 8 Q. B., 63.

The negative evidence could not prejudice him in whose favor the law raised those presumptions. This is so clear as to render it unnecessary to consider other obvious objections to the mode in which the evidence in question was offered. As regards certain evidence offered by the plaintiffs after the defence was gone through, to prove that at the particular time and in the particular localities when and where the accidents happened, the road was not in a proper state of repair it is sufficient to say that it was part of the plaintiffs' case and could not be received at that stage of the trial when it was offered. It was decided in *Rex v. Hilditch*, 5 C. & P., 290, that any evidence that is a confirmation of the original case cannot be given as evidence in reply, and the only evidence that can be given in reply is that which goes to cut down the defence without being any confirmation of the original case.

As regards the objection taken by the plaintiffs' counsel that the Judge should have allowed the plaintiffs to give general evidence of the defective state of defendants' rails in other localities than the precise ones where the alleged injuries to plaintiffs' vehicles happened, whereas he did not allow defendant to give general evidence of the proper state and condition of the rails over the whole extent of them generally, including the particular localities, it may be shortly, but very clearly, I think, disposed of thus;—the defendant Company, from the necessity of its position, was permitted to give general evidence of the proper condition of its road, because, as no notice was given to it by the plaintiffs of the injuries they had sustained or of the localities where they occurred until long after the events, it was not possible for it to show the state of its road at these times in the precise localities in question. The Company could only meet and refute the plaintiffs' allegation of their defect there by such general testimony.

The objection made to the reception of testimony of *Cassidy* and of others speaking to the same effect with him is governed

by the same views. The circumstance that individuals were in the habit of driving carriages without injury over defendants' road was from evidence that had a tendency to maintain its only possible answer to plaintiffs' allegation that the roadway was in a defective state in the particular places. It has been already shown that it was not possible for defendants to meet plaintiffs' particular allegation of that local defectiveness which caused the injury complained of by showing a good state of repair in the localities.

It is conceded by the majority of the Court that if I had put this case to the jury on the mere credibility of the opposing witnesses, the verdict, as found, could not have been disturbed; in fact, that, considered in view of the evidence, it is a proper verdict. Having regard to the importance of the public travelling interests on the one hand, and those of the incorporate Company on the other, I felt that something more than this would be, if not expected from me, at least not out of place. I must be permitted to add, that I have seen no reason except that a majority of the Court has expressed an opposite opinion, to doubt the soundness of the views on several principles, which, in summing up this case, I announced to the jury that tried it.



## SNOW v. MORTON.

J. G. and P. C., adjoining proprietors in the town of Liverpool, under whom plaintiff and defendant respectively claimed, for the purpose of settling disputes that had arisen between them concerning the line between their lands, entered into a written agreement in the year 1800, settling the line in dispute, and containing the following clause: "And it is hereby further agreed by and between the said J. G. and P. C. that the dock between their wharves on the eastern side of the aforesaid line of separation shall forever remain open as it now stands, that is to say, that neither of them shall fill it up with wharves or other incumbrances whereby the convenience of the same may be damaged to the other party." From the date of the agreement down to 1868, J. G. and those holding under him had the exclusive use and possession of the dock, when defendant asserted a right to use it under the agreement, and placed vessels therein. Plaintiff brought trespass, and, on the trial a verdict was found in his favor.

A rule having been taken out to set the verdict aside, the Court were equally divided.

SIR W. YOUNG, C. J. was of opinion that a use in common of the dock not having been expressly declared, it could not be inferred.

DESBARRÈS, J. was of opinion that the exclusive uses by J. G. and those claiming under him.

JOHNSTON, E. J. and WILKINS, J. were of opinion that the rule for a new trial should be made absolute.

SIR W. YOUNG, C. J.—There are three counts in the declaration in this case, each of them alleging a seisin or possession of the plaintiff in a wharf or dock at *Liverpool*, and that the defendant had disturbed him in the free enjoyment of said dock by placing a vessel and other incumbrances therein, and preventing the plaintiff's free ingress and egress, and the uninterrupted use thereof. In his seventh plea the defendant set up an agreement between the original proprietors of the plaintiff's and defendant's wharves, whereby the dock in question was to remain open forever, for the use of the two parties, and their heirs and assigns in common. The eighth plea alleged that the dock was part of a navigable river, and a public and common highway for all Her Majesty's subjects, and the dock being a public dock, the defendant used it as he lawfully might. There are several replications to these pleas, re-asserting among other things the right of the plaintiff to the exclusive use of the dock on various grounds, and if the party under whom the defendant holds ever had any rights in said dock, alleging his abandonment thereof by non-user, and an adverse possession for twenty years in the plaintiff and the person from whom he derives title.

It appeared on the trial that the late *James Gorham* who conveyed the premises to the plaintiff in 1836, had entered into an agreement so far back as the year 1800, in reference to this dock, with *Paul Collins*, the adjoining proprietor to

the west, under whom the defendant held, which was under seal and was duly recorded, and therefore bound the plaintiff, although he knew nothing of it when he purchased and would not have purchased if he had. Nor is this to be wondered at, for it deeply affects his interest, and if it bear the construction contended for by the defendant, it renders the property of the plaintiff almost valueless for business purposes.

I was of opinion at the trial that it did not bear that construction, though the obscure way in which it is worded perplexes the case with some doubt. It is stated in the agreement that sundry disputes had arisen between the parties concerning the line and particular boundaries, landmarks, &c., by which their lands were severally held, and that both parties being desirous to put an end to said disputes, and to settle and determine in a permanent manner, and fix the line where it should forever thereafter remain; they proceed to describe the line, with a boundary beginning by the side of the main street as it then ran, but now running much farther to the south, such line to run to the river in a course north twenty-seven degrees west, (the course in *Collins'* deeds being north twenty-two west,) which line it is declared shall forever after separate the land of the two parties, and be counted for the true line of separation at all future periods. Then follows the clause on which this action turns, declaring "that the dock between the two wharves on the eastern side shall forever remain open as it now stands, that is to say, that neither of the parties shall fill it up with wharves or other incumbrances, whereby the convenience of the same may be damaged to either party." It is further declared by a note made before signing that the distance between the two wharves being measured is thirty-three feet and a-half, which is to be kept open to the eastward of said line. This agreement being under seal and made by the proprietors on both sides of the line, and containing covenants running with the land, it is proper in determining their true meaning to have regard to the conveyances and circumstances in proof.

The deed of 26th November, 1788, conveyed to *Benjamin Collins* a lot beginning at the east corner of *Paul Collins'* land, running along the road to the eastward seventy-five feet or thereabouts, and carrying that breadth to the river adjoin-

ing said *Paul Collins'* lands. The deed of *Benjamin Collins* to *James Gorham* in 1797, conveys the same lot, describing it as beginning at the east corner of *Paul Collins'* land, where his house then stood, and running eastwardly by the road seventy-four feet or thereabouts, and carrying that breadth to the river or the whole of the land, be it more or less, below the road, as the same was deeded to the said *Benjamin Collins*. The deed of 1836, from *James Gorham* to the plaintiff, conveys the lot and parcel of land, water lot, wharf and stores, bounded westerly by lands of *Paul Collins*, as the buildings and fences then stood. This width of seventy-four feet on the main street up to the old wall and including the dock, the plaintiff has held ever since he became the owner, and for eight years before when he went into possession as a tenant of *Gorham's*. He testified that before 1830, *Paul Collins* pointed out the dividing line from the main street by the old wall down to the spile at the end of the wharf, remarking that he had nothing to do with the dock east of that line. "A few days after I purchased," he adds, "*Collins* pointed out the same boundaries as in the plan, and laid no claim to any dock." *Collins* died in 1840; his widow and son-in-law, *Knowles*, had charge of the property. "I told *Wylde*, who built the blacksmith's shop by my permission, to keep within the line." *Knowles* thought he was encroaching, and we settled the line old buildings, which *Knowles* was perfectly satisfied with. *Mr. Campbell* hired the property from *Mr. Gorham* in 1819, and occupied it till 1827. No one ever interfered with the use of the dock. He used it for all purposes. *Collins* never interfered with his rights nor used the dock, which was often full, and was always known as *Gorham's* dock. *Mr. F. Collins*, plaintiff's partner, said that the firm had the exclusive use of the dock from 1841 to 1867. There is a mass of other testimony to the same effect, and although on the other side there is proof of the dock having been occasionally used by *Collins*, of his having had a landing for his boat where the defendant's road now is, and of *Collins'* non-user having arisen, it may be from neglect or poverty, the evidence of a continued and exclusive claim and user by *Gorham* and his tenants, and by the plaintiff and persons in his employ largely preponderates.

These facts, though not of themselves conclusive, aid us in the construction of the agreement. The deeds show that the line of separation in the agreement, placing the dock entirely on the plaintiff's side, is consistent with the original title, and that the covenant for the dock remaining forever open is to be regarded as an easement, granted, it may be, in consideration of *Collins'* line, N. 22° W., being recognized to be N. 27° W., as it stood in the year 1800, and still remains with the variation. It is the clause in the deed of 18th January, 1864, to the defendant, which carries him along the street to the boundary established between the property thereby conveyed, and the property owned and occupied by the plaintiff under the agreement of the 18th November, 1800, thence N. 27° W. to the river or harbor.

With these instruments before us the question first suggested at the trial, before the agreement was brought in, does not arise. It was stated there that not only was there no grant from the Crown below high-water mark to these parties, but that there was no such grant to any of the owners of wharves in the harbor of *Liverpool*. If it be so, it is certainly an anomalous state of things, and led, in this case, to the startling proposition that below high-water mark there was no title whatever. I declined subscribing to this doctrine at the trial, but it cannot be denied that difficulties and complications might arise, which it would be wise in the wharf-owners there to contemplate and provide for.

As respects the agreement, I have already said that while it professes to be very explicit, it is by no means so clear as one would desire. That the dock must forever remain open, giving free access of air and light to the *Collins* property on the west is undoubted; it is not to be filled up with wharves and other incumbrances inconveniencing either party; but the question remains, by which of the parties is it to be used, and use in common is not declared, and if granted it would have been impracticable and most injurious to the rights of the owner, and to the reasonable and due enjoyment of his property. It ought not, therefore, to be inferred. It has been said that the grant of an easement is to be taken most strongly against the grantor, upon the principle of taking words *fortius contra proferentem*, but this principle does not

seem to hold when a harsh construction would work a wrong to a third person, it being a maxim that *constructio legis non facit injuriam*; *Co. Litt.*, 183a; *Broom's Legal Maxims*, 575. The better rule is to ascertain as near as possible, and carry into effect the intention of the parties. This is exemplified in the case of *Plant v. James*, 5 B. & Ad., 791, where the question was whether a right of way passed under the word "appurtenances" in a deed. The Court of King's Bench thought it did not. "Whether the parties," said Lord Denman, "intended to have included the way is a mere matter of conjecture, but the question in this and all similar cases is not what the parties intended to have done, but what is the meaning of the words they have used." It may be that these instruments have not carried into effect the intention of the parties, and that there has been a mistake in the words used; but they must take the consequences of their neglect, if it be so; and it would be dangerous to unsettle the meaning of legal terms in order to obviate a particular mischief." This decision was, however, reversed by the Exchequer Chamber, 4 Ad. & El., 749, who thought the intention of the grantors to pass the way sufficiently appeared, and so construed the deed as to carry into effect the manifest intention of the parties. It is to be noted that the easement in the case in hand is a continuous easement, and the cases recognize a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements; *Polden v. Bastard*, 13 L. T. Reps., N. S., 441. The right of way of defendant, if established would not only be a perpetual burden on the property, but a perpetual obstruction to the use of it by the owner. I think this an unreasonable construction which the parties did not intend, and, therefore, that the verdict for the plaintiff should be upheld.

DESBARRES, J.—This case depends on the construction to be put on the agreement of the 18th November, 1800, made between *James Gorham* and *Paul Collins*, the parties under whom the plaintiff and defendant respectively claim. It appears from the recital in the agreement that disputes had arisen between them concerning the line and boundaries

between the land whereon the house of *Paul Collins* then stood and the land of *James Gorham*, adjoining the same, both lying between the main street and the river, and both parties were desirous to put an end to the disputes, and to fix and determine the line in a permanent manner. To this end both parties agreed "that on a certain rock on *Paul Collins* side, the letters P. C. marked thereon on its eastern side should never be effaced or destroyed, and if they should become effaced by time, they were to be renewed by and in the presence of both parties on said rock lying by the side of the main street. That the land of the said *Paul Collins* should extend towards the land of *James Gorham*, from the letters so marked on said rock three feet ten inches, and a corner S. 84° E. by the side of the main street, where it should terminate, from the point or corner bound a line drawn to run to the river in the direction north 27 degrees west, should forever after this separate the land of the two parties and be counted for the true line of separation at all future periods." So far the agreement is plain and intelligible, but now follows a clause the meaning and intent of which it is difficult to interpret, and out of which the present action has arisen. It is in these words: "And it is hereby further agreed by and between the said *James Gorham* and *Paul Collins* that the dock between their wharves on the eastern side of the aforesaid line of separation shall forever remain open as it now stands, that is to say, that neither of them shall fill it up with wharves or other incumbrances whereby the convenience of the same may be damaged to either party." The construction put on this clause of the agreement by defendant is, that as neither party was to be at liberty to erect wharves or other incumbrances on the dock, it was to be presumed that each had an equal right in the dock with the other as tenants in common, and that they entered into this agreement to preclude themselves from making any kind of erections in the dock that might be prejudicial to either; but when it is considered that *Collins* had a dock of his own to the west of that in question, (now defendant's,) which he always used, and that *Gorham* subsequent to the agreement always used the other dock as his sole property, it will be seen that this clause could never have been intended to receive the construction which

has been given to it by the defendant. There is abundance of evidence, beginning with that of *John Campbell*, who occupied the wharf and dock in question for eight years as tenant, from *June*, 1819, to show that *Gorham* and the plaintiff who purchased from him, until within a recent period, when defendant laid his vessel in the dock, always had the exclusive use and possession of this dock, and that, I think, precludes any inference to be drawn from the wording of the last clause as to the existence of any tenancy in common. The first and main object of the parties in making this agreement was to settle and define the boundary of their respective properties, and in doing that it was agreed that the dock should always remain open, a concession which may possibly have been made by *Gorham*, as his Lordship the Chief Justice told the jury, for the benefit of the defendant, in consequence of an alteration in the line assented to by *Collins*, by which *Gorham* was to be benefitted.

There is not only proof in this case of an exclusive user of the dock in question by *Gorham*, and those holding under him, from the date of the agreement down to 1868, when defendant asserted a right to use it in common with the plaintiff, but there is besides the very important evidence of the plaintiff, that before the year 1836, *Collins* pointed out the dividing line from the main street by the old wall down to the spile, remarking "that he had nothing to do with the dock east of that line." In this evidence the plaintiff is corroborated by the evidence of *John McLeod*, who having a vessel to be repaired in *Collins'* dock in 1837, hauled her into *Gorham's* dock, and *Collins* seeing her there pointed out to him the old wall and buildings, and the spile at the end, saying, "This is my line, take the vessel on my side," adding that "he had nothing to do with the east dock." This clear and positive evidence of a disclaimer of title in the east dock by *Collins*, a party to the agreement, who must have known the purport and meaning of the ambiguous clause in it before referred to, shows, as I think, conclusively, that he neither had, nor pretended to have, any right or claim in or to the east dock, and if he had no title, it of course follows that the defendant, who claims under him, can have none. I, therefore, think the rule for a new trial must be discharged.

JOHNSTON, E. J.—The agreement in this case is ambiguous. There is enough to show that the parties may have meant to reserve a mutual and an equal right to the dock ; and again it seems very unlikely from the nature of the subject that this was the intention. The fact of possession might throw light on the construction, it might do more, it might give a right independent of, or in opposition to the agreement. The jury have not passed on the possession. I think it is important they should do so. For the perfect consideration of the case I would like to know how the possession was after *Gorham's* purchase up to the time of the agreement ; and again, how it was after the agreement. I think that a new trial is necessary for this purpose, giving liberty to each party to amend the pleadings, if desired ; and I think there should be no costs of the argument.

WILKINS, J.—The construction of the written agreement in evidence, dated the 18th *November*, 1800, and made between two persons who then were proprietors respectively of the lands now of the parties to this suit, appears to me unattended with difficulty. We must get at their intentions by interpreting their words in the light of the circumstances in which they were placed at the time of the execution of the instrument. There had been a contention between them about division line of their conterminous lands which they owned or claimed, not only down to ordinary high-water mark, but considerably below it, and below common low-water mark, Contiguous to and along that line on the western side of it. *Collins*, one of the parties had then erected, and had in his occupation a wharf extending down into the river or harbour of *Liverpool*. That wharf abutted on its eastern side on land about thirty feet wide, extending down into the harbour, over which tidal waters ebbed and flowed, and which at ordinary high tides was covered by the waters of the river or harbour above-mentioned. The land so covered with water was then claimed as the soil and freehold of *Gorham*, the other contracting party, and by the agreement is conceded to be his.

Contiguous to, and along the eastern side of the last-mentioned land so covered with water, *Gorham* had then erected and was using and occupying a wharf, which also



extended abutting on the said land down into the river and harbour. An aged witness, *Dunlap*, who was eighty-two years old at the trial in 1869, who left *Liverpool* in 1815, a nephew of *Gorham*, and who worked for him, as he says, from the time he was able to work, and on the wharf of *Gorham*, speaks of several vessels having, at his earliest recollection, loaded at the end of his wharf, while the smaller ones came into that very intermediate space of tidal water between the wharves, which is the subject of contention between the parties to this suite. He described *Gorham* at such, his first recollection, as having, so far as he knew, the exclusive use of the dock in question, though he admits *Collins*, the other party, might also have used it. This witness does not fix his first knowledge of the circumstances of the parties to the agreement relatively to this dock, and their wharves, being at or anterior to the year 1800; but it would seem not to have been at a period much posterior in date to it. He may, therefore, be considered as throwing some light on the construction by aid of his early history of the circumstances connected with the instrument before us. His is the only testimony that could do so.

The document, after reciting the differences that existed respecting their common boundary, adjusts it from a starting point on one of the streets of *Liverpool* down to the river, and then proceeds thus:—"It is hereby further agreed by and between the said *James Gorham* and *Paul Collins*, that the dock between their wharves on the eastern side (*Gorham's* side) of the aforesaid line of separation, shall forever remain open as it now stands, that is to say, that neither of them shall fill it up with wharves and other incumbrances whereby the convenience of the same may be damaged to either party." At the end of the instrument these words occur:—"N. B.—Before signing, the distance between the two wharves being measured is thirty-three feet and a-half, which is to be kept open to the eastward of said line."

The parties for the performance of the respective covenants, lines and boundaries, bound themselves and their respective heirs, executors, administrators and assigns, mutually and subject to a penalty of £1,000. It is clear that the measured space of thirty-three feet and a-half, called the

"dock" was forever to remain open as it then stood, that is as a "dock," subject, so far as natural causes might permit, to the flow and re-flow of the tidal waters; that neither of the parties was to be at liberty to fill it up with wharves or other incumbrances of that kind or nature, or with any substance whereby the convenience, (*i. e.*, the convenient use) of the same (as a dock, for such it then was,) to either of the parties could be damaged. In other words, no act was to be done by either party in relation to it which would change its character of a "dock," or lessen its usefulness as such. *Worcester* defines this word,—1. "A place for building, repairing, or laying up ships, or where ships are loaded or unloaded." 2. "A space between two contiguous wharves." It seems to me quite certain that the covenant now under consideration was entered into for the sole and exclusive benefit of *Gorham* and those who might claim under him, for in that view, as he owned the soil down to ordinary high-water mark, and the other contracting party had no right to the subtending soil covered with water below high-water mark, the covenant was superfluous as respects him. The words "whereby the convenience of the same (that is the antecedent dock) may be damaged to either party," seem conclusive to show that this covenant respected the common benefit and advantage of both the parties, and that the common benefit contemplated and designed to be protected was, and could only have been, in respect of their common use of the measured space as a dock.

It would follow, then, that any act done by either party that would obstruct or impair that use, and such act only would be an act done in violation of that party's covenant now under consideration. If this view of the effect of the agreement relied on by one of the pleas be correct, there should be a new trial. I do not see, as both parties had wharves, the one on one side and the other on the other of the dock in question, how on common law principles, apart from the agreement, the plaintiff could complain of the acts done by the defendant. I am of opinion that the rule should be made absolute.

## PETER GRANT v. WILLIAM A. ROBERTSON.

W. S. and B. & F. S. procured supplies from parties in St. John, N. B. and Halifax, N. S. to be used in the construction of a vessel, which, after her completion, was registered in the name of B. S. To the parties in St. John W. S. and to those in Halifax B. S., whose name alone appeared upon the registry, was represented as owner. Actions were brought by the St. John creditors against W. S. for the goods supplied on his credit, and judgments obtained, and executions issued, under which the vessel was levied upon and sold as the property of W. S. While the vessel was in the custody of the Sheriff and prior to the sale B. S. executed a bill of sale in the form required by the Act to plaintiff, one of the Halifax creditors, who immediately had the same registered, and received a formal delivery of the vessel from B. S. The Sheriff sold all the interest of W. S. in the vessel to defendant and delivered a bill of sale of the same which was not recorded. Plaintiff thereupon brought an action of replevin, which came on for trial, but in consequence of the length of the cause and insufficient time could not be concluded. At the suggestion of the presiding Judge a rule was entered into by which it was agreed that a verdict should pass for plaintiff, with power to the Court to determine and draw the same inferences from the evidence that a jury might do, and either enter a verdict for plaintiff or defendant or order a nonsuit as they might think fit, and also with power to determine the equities, if any, and to order a sale of the vessel and payment of the proceeds into Court to abide the judgment.

*Held*, First, by Sir W. Young, C. J., DUBARRIE, and DODD, J.J., (JOHNSON, E. J. *dubitante*, and WILLIAMS, J. *dissentiente*.) that, B. S., being the registered owner, was not precluded by the levy of executions against W. S. from giving the bill of sale to the plaintiff and transferring to the latter a possession sufficient to support replevin. Also, under the authority of *Lane v. Dorsey*, 1 Oldright, 575, that replevin would lie.

Second, by Sir W. Young, C. J., JOHNSON, E. J., and DUBARRIE, J., that the registry of the vessel being only *prima facie* evidence of title and, there being evidence of fraud and collusion between W. S. and B. S., in regard to the registry, in order to defeat the creditors of the former, that, under the equitable powers conferred by the rule, the parties affected by the fraud should be restored to their just relations to the vessel and the St. John and Halifax creditors be admitted to a rateable participation in the proceeds.

By WILLIAMS, J., that to draw inferences of fraud, unless they are irresistible in their character, for the purpose of annulling a registered *prima facie* title to a British ship, is beyond any judicial competency.

By DODD, J., that fraud was not sufficiently proved to avoid the *prima facie* title conferred by the registry.

SIR WILLIAM YOUNG, C. J., now, (January 7th, 1871.) delivered the judgment of the Court:—

This is an action of replevin tried at *Digby*, in *June*, 1869, when a special rule was entered into, which was very fully and ably argued before the Court in *December* term, and now stands for judgment. The matter in litigation was a ship called the *Arthabaska*, and the pleas put in were *non cepit* and *non detinet*,—an assertion of the defendant's title,—a denial of the plaintiff's possession at any time, and a fifth plea setting out a judgment and execution by *Turnbull & Wallace*, and another judgment and execution by the defendant and his partner for considerable sums against *William Short*, and a levy on the ship as his, though she was registered in the name of his son *Benjamin T. Short*. The plea then

avers that the ship was really and truly the property of *William*, and that the registry was falsely and fraudulently procured and continued by *Benjamin*, in collusion with *William*, to delay and defeat the creditors of *William*, who notwithstanding seized the ship and brought her to sale by public auction, when she was sold and delivered by the sheriff to the defendant. The plea also avers that after the levy and before the sale, the sheriff being still in possession and the plaintiff aware thereof, the said *Benjamin*, by bill of sale of the ship as a registered ship, fraudulently pretended and assumed to convey the same to the plaintiff. There was no replication to these pleas, and no equitable plea. The two houses above named do business in *St. John, N. B.*, and *Mr. Jones*, a third party doing business there, and having also a claim on *William Short*, and an execution against him, was introduced into the rule. The plaintiff, on the other hand, represents his own firm and the firm of *Essex & Co.*, both doing business at *Halifax*, and having claims on *Benjamin Short*, who sought to protect them and himself by the bill of sale. The claims of the five firms are all *bona fide*, and no imputation rests upon any of them; each of the two sets of creditors desiring to secure their own debt, and the alleged fraud as between the *Shorts* being confined to themselves.

It appeared on the trial that the levy was made on the ship in *August*, and that she was advertized for sale on the 2nd *September*, 1867, and that just before the time appointed for the sale, *Benjamin Short* executed a bill of sale, in the form required by the Act, to *Mr. Grant*, the plaintiff, who had it immediately recorded, and forbade the sale, which the sheriff then withdrew; the sheriff then consulted the attorneys of the defendant, and on the same day sold to him the interest of *William Short*, and afterwards executed a bill of sale thereof which has not been recorded. I am stating the evidence on this point as I shall state it throughout, not in detail but as a whole, conveying the impression it makes on my own mind, and touching only its leading features.

The first question raised at the trial and on the argument, and on behalf of the defendant was, whether replevin under these circumstances would lie. It was urged that the plaintiff had never been in possession of the ship, to which it was

replied that the possession of *Benjamin Short*, who had undoubtedly an actual possession independent of the father, was in nowise affected by the wrongful levy, and the pretended possession of the sheriff, and that the possession of *Benjamin*, having passed *de facto* and *de jure* to the plaintiff, the subsequent sale to the defendant, and his possession taken thereunder, was an illegal act, and could not infringe the plaintiff's right which he now asserted in replevin. Now it is well known that there is a difference of opinion upon the nature and extent of the action of replevin in this Court, and that a majority of the Bench give it a wider scope than two of my learned brethren altogether approve. This difference has been fully argued, and I desire to incorporate with this judgment my former judgments as reported in 1 *Oldright*, 352 and 575, and to note particularly, as I did in the last of these judgments, in *Lane v. Dorsay*, 1 *Oldright*, 579, that I found my opinion altogether upon our *Provincial Act*, freely admitting that it is at variance with the *English* rule; at present it is enough to add that the majority of the Court who take part in this judgment hold that it comes within the spirit and meaning of our previous decisions, and that the plaintiff having acted on these was in our opinion entitled to his writ.

An immense mass of testimony was produced, occupying the time of the Court for four days, and extending to the afternoon of Saturday, the last day on which the Court could sit. As it was obvious that the addresses of counsel and the charge would run into a late hour, and would leave the jury but little time to consider so complicated a case, and it was, therefore, doubtful if any verdict could be obtained, I suggested that the counsel should come to an agreement on the terms of a rule, remitting the whole matter to the Court, to be signed by the counsel, and by *Benjamin Short*, who was then present. After a long negotiation this was effected, and a rule was signed which, although not altogether what I would have myself approved of, will enable us, I trust, to do justice between the parties. It imposes on the Court rather an invidious office,—to draw inferences where fraud is the substratum of the defence,—but this is a responsibility incident at times to all Courts, and from which they are not at liberty to shrink. I may add that as the ship at the time of the

trial was laid up at *Halifax*, I suggested that she should be sold at once, and the proceeds paid into Court, but *Benjamin Short* refused his assent, as he had a right to do, having signed the rule, I am bound to add, with considerable reluctance.

There is no necessity for a Court, when a disputed question of fact is submitted to them, any more than for a jury, to state the grounds of their conclusion, which in the present instance would protract this judgment to an inordinate and inconvenient length. I am the less disposed to do this because it is impossible not to condemn the conduct of *William Short*, and he has departed this life since the trial. It was too clear to be denied, from the evidence of the three *St. John* witnesses, all intelligent and respectable men, from *William Short's* own letters and entries, from his connection with the ship, the mortgage he took from *Benjamin* and released, and from many other circumstances in proof, that he misled and deceived his *St. John* creditors; that they trusted him on his representation and in the faith that he was the builder of the ship, and that they were to be paid out of her proceeds. The goods furnished by *Turnbull* and *Wallace*, and by the *Robertsons*, went to a large extent directly into the ship, and the other goods supplied by them and *Mr. Jones*, went no doubt, to a considerable degree, into the hands of the workmen. Nor is it possible to exempt *Benjamin Short* from blame, though in a less measure. The evidence that presses most strongly against him is that of *Mr. Jones*. He is proved to have told *Mr. Jones* that his father was very busy getting his vessel ready for launching,—that the father could not come over to *St. John* on that account. He wanted more goods than *Mr. Jones* could give him. At that time *Mr. Jones* had no suspicion, and first heard reports of the transfer of the ship three or four months after in *January* or *February*, 1866. It was stated at the argument that *Benjamin*, being no party to the suit, could not be heard in reply, but I cannot help thinking that being present in Court, it would have been more prudent in him, if he could have contradicted the above statement, to have expressed his willingness to be examined. The evidences, on the other hand, of the ship having been built and owned by him independent of

his father, and of her having been navigated for his benefit, are numerous and strong, and in my opinion would have greatly puzzled a jury. He hired the yard in which, and the men by whom the ship was constructed; these men he paid; most of them had no knowledge of *William Short* in the transaction; he engaged the master who sailed her, and who accounted with him alone for several months; from first to last the master, who was an intelligent and apparently a disinterested witness, never heard the father claim property in her.

There is no question that *Benjamin* gave his whole time and thoughts, and devoted his whole credit and means in 1865, including the supplies he received from his *Halifax* creditors, to the building of this vessel; and my own conviction is, that she was built with the joint means and on the joint account of the father and son. *Crowse*, indeed, one of the defendant's witnesses, says that *William* and *Benjamin Short* hired him and called the ship theirs, though he afterwards qualifies this declaration.

Such being the facts of the case, and the impression they have left on my own mind, let us now turn to the law of it, which, as we will presently find, involves very important questions.

It was contended by the plaintiff's counsel that the registered owner of a ship is the only owner known to the law or in equity; that the title of *Benjamin Short*, being the registered owner, could not be impeached at law, and that the plaintiff deriving title from him, and having become the registered owner, his title was in no way affected by the previous conduct of *Benjamin Short*, even though it should be held to have been fraudulent. These are extensive propositions, supported, it is said, by many cases, and as we all know, very commonly entertained. The cases on the *Registry Acts* were thoroughly reviewed in the unanimous judgment given by this Court in *July*, 1862, in the case of *Cahoon v. Morrow*, 1 Oldright, 148. The latest that were there cited were those of the *Liverpool Borough Bank v. Turner*, 3 Law Times Rep., N. S., 84 and 494, and *McLarty v. Middleton*, 4 Law Times Rep., N. S., 852. In the first of these in 1860, Vice-Chancellor *Wood*, now Lord-Chancellor *Hatheway*, said; "The question

was, whether or not the Legislature had departed from the policy by which it was provided that all transactions from 'the original grand bill of sale' downwards, should appear on the face of the register." After remarking on the language of the *Mercantile Shipping Act*, 1854, and other matters *dehors* the register, the Vice-Chancellor said, "it appeared" to him, "that unless he could find some reason for altering the public policy, that policy, having a clear and distinct title on the the register, totally unaffected by any of these matters *dehors* the register, must still prevail." On appeal from this decision Lord Chancellor *Campbell*, in affirming it, said; "A disclosure of the true and actual owners of every *British* ship, is considered to be of the utmost importance, with a view to the commercial privileges which *British* ships are entitled to, and still more with a view to the proper use and honor of the *British* flag. The state can only attain the desired information by the register disclosing the names of the true owners; and by the evidence being considered by the state the only evidence of ownership." By section 43 also of the *Mercantile Shipping Act*, 1854, a clause then for the first time adopted, it was enacted that no notice of any trust, express, implied, or constructive, shall be entered in the register book or received by the registrar.

So the law stood till *July*, 1862, when the Amendment Act of that year was passed, and the 3rd section, giving a declaratory construction to the expression "beneficial interest" in the principal Act, and permitting equities to be enforced against owners and mortgagees of ships in respect of their interest therein, introduced a new element into the law of shipping. The meaning and extent of this very important section do not appear to have come much before the Courts, and are more restricted than would naturally suggest themselves on a first perusal, if the view taken by *Mr. McLachlan* in the supplement to his *Treatise on Merchant Shipping*, fol. 4-5, is to be received as sound. "The only equities named," he says, "are equities *against* owners and mortgagees. Equities *in their favor* could not be enforced under the previous shipping acts." He concludes, therefore, "that the statute of 1862, since it distinctly mentions only equities *against* owners and mortgagees, becomes exclusive as to all other rights not



on the register, which could not exist except in derogation of the absolute title evidenced by that document." Notwithstanding the recognition now of interests arising under contract, and other equitable interests, the register, he adds, "on which they cannot appear, and the respective statutory instruments of sale or mortgage, the use of which is a condition to registration, are still indispensable to the acquisition of the full rights of property valid against all claimants." These opinions coming from a writer of authority are of considerable weight, but were not at all reviewed or even mentioned at the argument of this case, and I have not found them either affirmed or denied in the few cases reported in the books. In *Stapleton v. Haymen*, 9 L. T., N. S., 655, 2 Hurlstone & Coltman, 918, *Pollock*, C. B., speaking of the above section, says, "that after the decision in the *Liverpool Borough Bank v. Turner*, it was feared that the rights of the vendee of a ship might be defeated after he had paid the purchase money by the bankruptcy of his vendor, and the Legislature therefore intervened, and by this enactment gave effect to the equities arising out of contracts." The section is also relied on in *Ward v. Beck*, 13 C. B., N. S., 668, where it is stated by *Mr. Lush* to have arisen out of the decision already cited. It seems, also, to have been the ground-work of the case of *Lacon v. Liffon*, 32 L. J. Chanc., 25, which we know only from the foot-note to *Maude & Pollock's Compendium of Shipping Law*, 35.

I wish to be understood, therefore, as speaking with great diffidence of the legal effect of this section, or its exact bearing on the case in hand. The main ground on which the defendant attacks the plaintiff's title is set out in the fifth plea, alleging that the registry to *Benjamin Short*, on his declaration of ownership, 20th December, 1865, was falsely and fraudulently procured, and that in the eye of the law; *William Short*, notwithstanding the registry, remained the real owner. The principal case in support of this contention was that of *Orr v. Dickinson*, reported in 1 *Johnson*, 1; 28 L. J. Ch., 516, to neither of which we have access, and I refer to it from a manuscript copy furnished by the defendant's counsel. There, a power of sale under the *Merchants' Shipping Act* had been misapplied, and the directions of the statute evaded by the

insertion of a fictitious amount, the sum of £1300 having been substituted for £900 actually advanced. Vice Chancellor *Wood* says in his judgment; "A man who has given a power of attorney to another to sell for £1300 has not authorized the attorney to sell for less, *that* the statute says, and *that* common sense and every principle of law require." "Therefore the bill of sale though purporting to be good, so that the registrar would be obliged to treat it as a perfectly valid instrument, was a nullity, and there was no reason for passing by such an instrument as that, any interest in the vessel." This decision it is to be noted, was in 1858-9, four years before the passage of the *Amendment Act*, and turned partly on the distinction between the legal and equitable title in ships which does not apply here. The Vice Chancellor held that the legal title had not passed, and that the bare fact of the registration of a bill of sale valid on the face of it, would not of itself give an absolute title at law. The power not having been exercised in conformity with the certificate, it had no more effect than if the bill of sale had been a forgery. "I can find nothing," said he, "in the principle of national policy, which requires that registration shall give operation to that which is a nullity, and as such I think the registry of sale must be treated here."

A decision of the Supreme Court of *New Brunswick* in 1840, that of *McLean v. Grant*, 1 Kerr, 50, proceeds upon the same principle. There it was held that a registry of a ship procured by fraud on the true owner, by a person who had obtained possession, by means that were unknown, of the builder's certificate, and made a false declaration of ownership at the custom house, is null and void, and will be considered at law as well as in equity, not to affect the property and right of possession as against the owner and his lawful assignee. The plaintiffs were the assignees of the builder under a general trust deed for the benefit of creditors, and the action was replevin. It was contended at the trial that the registering of the ship by the collector vested the property in the defendant, so far as legal rights were concerned; and that the certificate of registry remaining unrevoked must be taken as the index of property, and that the plaintiff should have resorted to the Court of Chancery to set it aside, if fraudu-

lently and improperly obtained. But the Court held that the registering being fraudulent and void should be so treated in a court of law as well as in equity.

There are two other cases, decided in 1868 and '69, to which I shall now refer, being the latest that I have found. The first is *Michael v. Fripp*, 19 Law Times Reps., N. S., 257, where the question was as to the power of a guardian over a ship registered in the name of his son, a minor, and it was held that a mortgage and bill of sale executed by the guardian were null and void. Vice Chancellor *Maling* in his judgment referred to *Orr v. Dickinson*, and said he was glad it had been decided that, although the name on the register is *prima facie* evidence of ownership, it is not to be taken as conclusive. The other case is that of *Bell v. Blyth*, 19 Law Times Reps., N. S., 662, which is very interesting as showing the value that still attaches to the registry. The foot-note says, and the judgment of the Lord Chancellor and the late Lord Justice *Selwyn* sustain it, that it is the whole object of registration under the *Merchant Shipping Act*, 1854, that there shall be a true statement upon the register of every transaction; and when there is standing upon the register only one mortgage which is therein shown to have been discharged, the mortgagor, aware of a subsequent mortgage which the mortgagee has neglected to register, cannot hand over the old security to a third person, so as to give him, in virtue thereof, precedence over the holder of that subsequent mortgage. And notwithstanding that the entry of the discharge of the earliest mortgage was made by error, and that there appeared upon the register an entry to that effect signed by the registrar, it was held that the earliest mortgage was entirely gone by the entry on the register of its discharge. I do not go into the circumstances of this case as they have no bearing upon the present, but it is remarkable that the error committed was that of the registrar, and that the law did not permit him to redress it by a subsequent entry.

Let us pause now and inquire what rule may be fairly derived from these cases. It is obvious that the register of a ship, though it may be perfect on the face of it, is only *prima facie* evidence of title, and that a prudent vendee must look behind it and ascertain on what it is founded. The bill of

sale may be a forgery, or the power on which it rests imperfect or fraudulent, the bill of sale as in the *New Brunswick* case may have been cancelled, and the builder's certificate used without authority; it may have been executed under a certificate which it professes to follow, but does not; the register may be colorable to conceal the nationality of the owners, as in the case of the *Princess Charlotte*, Bro. & Lush., 75, where the Court of Admiralty held it to be no better than waste paper. In these and the like cases of palpable fraud or of graver crime, there is no difficulty in applying the rule. It would be monstrous to allow a forged bill of sale, or a stolen or misapplied certificate to be the ground work of a title. But suppose there is no forgery and no fraud upon the builder or owner, and that with his full assent, or upon his bill of sale duly executed, though upon a pretended or an inadequate consideration the register passes, what is to be the effect in these and similar cases of proceedings perfect upon the face of them. On the one side there is the natural desire and the duty of a Court to uphold the just claims of creditors, and to defeat any attempt to out-manceuvre and defraud them. On the other, the danger of compelling a *bona fide* purchaser or mortgagee to look in every case to matters *dehors* the register or the bill of sale, and thereby lowering the saleable value and the transferable properties of shipping.

I throw out these suggestions as demonstrating the difficulty, or rather the impossibility, of laying down any general rule. Every case must depend upon its own circumstances, and it is upon the peculiar circumstances of this case that we are bound, I think to decide it.

As I have already said, I think the register was wrongfully taken in the single name of *Benjamin Short*, and that the father's name ought to have been associated with the son's. If the object was, as seems but too palpable, to shut out the *New Brunswick* creditors who had supplied the iron, the cordage and the sails, so much the more anxious would a Court be to defeat such an object. To give full effect to the agreement of 2nd September, 1867, by paying the *Halifax* creditors in full, and handing over the surplus to *Benjamin Short*, would be contrary to every principle of justice. On

the other hand it must be remembered that having notice of the register to *Benjamin Short* in *January*, 1866, they lay by for many months, assenting apparently to his ownership, and giving him a factitious credit of which he availed himself in *Halifax*. *Grant, Romans & Co.*, and *Essex & Co.*, are admitted to be *bona fide* creditors, and they did nothing from which any merchant in the ordinary course of business would have shrunk. They accepted a conveyance from the registered owner to cover their debt, aware indeed of the contending claims, but ignorant of all the circumstances which have given to this case its peculiar character. To pay the *New Brunswick* creditors in full and shut out the *Halifax* creditors would be equally repugnant to equity and justice. The rule empowers us to determine all the equities which can be enforced in a Court of Equity, and to order a sale of the ship, an accounting and a distribution. Now it is a rule that equity looks upon that as done which ought to be done. This enables agreements to be performed as they ought to have been according to the original intent, not as the parties may have executed them. The *Shorts* ought to have been on the register as owners equally entitled. They built the ship in common, and had the joint benefit of the materials and goods expended in her construction. I am of opinion, therefore, that the net proceeds of the ship and her earnings since *September*, 1867, should be distributed at an equal pound rate among the five firms composed of the *New Brunswick* and *Halifax* creditors, and the surplus, if any, paid to *Benjamin Short*. A rule should be drawn, referring the accounts of the ship's husband to a Master of this Court, allowing the \$315 paid to *Beard* and *Vining*, and all necessary and proper outlays for repairs, wages, premiums of insurance, and other things in and about the ship, and charging her earnings and freights to the time of accounting, ordering also that the ship on her arrival should be sold under the direction of the same Master by public auction, and conveyed by the plaintiff as the registered owner to the purchaser, the purchase money to be lodged in the bank in the name of the accountant-general, and paid out under the order of this Court or a Judge thereof.

The question of costs under both branches of the rule is for the present reserved.

DESBARRES, J.—This was an action of replevin for the brigantine *Arthabaska*, which the plaintiff claims under a bill of sale executed to him by *Benjamin Short* on the 2nd September, 1867, and registered on the same day by the proper officer of the port of *Digby*. It was given in payment of certain debts due by *Benjamin* and *F. Short* to the respective firms of *Grant & Romans* and *Essex & Co.*, merchants in this city, for goods supplied by them to *B. & F. Short*, amounting together to \$1887. This vessel was built in 1865 at *Bear River*, in the county of *Digby*, where *B. & F. Short* resided and carried on business together as merchants. It appears that *Benjamin* hired the shipyard, procured the materials for the hull of the vessel, and hired the workmen, whose wages were paid partly in cash and partly in goods out of the shop; but it was proved that *Wm. Short*, the father of *B. & F. Short*, who also resided at *Bear River*, had purchased from the defendant and his partner, merchants in *St. John, N. B.*, the sails, rigging, chains and anchors for the said vessel, amounting to \$2400 or \$2500, on his own credit, a circumstance from which it might be presumed that the father and the sons were jointly interested in the building of the vessel, and that if *Wm. Short*, the father, was not the sole owner, he was at least an owner of a large portion of the vessel. On the 20th day of December, 1865, *Benjamin Short*, having obtained the builder's certificate, and made the usual declaration of ownership required by the *Merchant Shipping Act* of 1854, obtained a register of the *Arthabaska* at the port of *Digby* in his name as sole owner, and on the same day executed a mortgage of her to his father, *Wm. Short*, for \$8074, which was discharged on the 20th June, 1867, though it does not appear that any money was paid by *Benjamin* to his father. *Benjamin Short* being then the registered owner sent the vessel to sea, and on her return to the port of *Digby*, after making several voyages to the *West Indies* and the *United States*, she was seized by the sheriff under several executions issued against *Wm. Short*, and advertised for sale. While the vessel was in the custody of the sheriff, and before any sale was effected under these executions. *Benjamin Short* executed to the plaintiff the bill of sale of the *Arthabaska*, before referred to, of the 2nd September, 1867,

for payment or security for the payment of the amounts due to the firms of *Romans, Grant & Co.*, and *Esson & Co.*, whereupon possession of the ship was formally delivered by *Benjamin Short* to the plaintiff, who then became the sole and absolute owner of the ship for which the present action was brought. After the execution and recording of the bill of sale from *Benjamin Short* to the plaintiff, and on the same day the vessel was set up and sold at public auction by the sheriff, and under the execution issued against *Wm. Short*, and knocked down to the defendant for the sum of \$——. A bill of sale was on the following day (3rd *September*) executed by the sheriff to the defendant of all *Wm. Short's* right and interest in the ship, which was not registered, and under this instrument the defendant claims to be the owner of the vessel, alleging that though registered in the name of *Benjamin Short*, the *Arthabaska* was in point of fact the property of *Wm. Short*, who to protect her against the claims of his creditors connived with, and fraudulently allowed his son *Benjamin* to procure the register in his own name.

This cause was tried before His Lordship the Chief Justice at the close of the *June* term, 1869, at *Digby*, who, not having sufficient time to hear the addresses of counsel and submit the case to the jury, after all the evidence on both sides had been taken, suggested that a verdict should be entered, subject to the opinion of the whole Court, upon the law and facts of the case. That suggestion having been adopted, the case was ably argued before us on the following *December* term, under a rule entered into between the parties, by which it was agreed that a verdict should pass for the plaintiff, with power to the Court to determine upon and draw the same inferences from the evidence that a jury might do, and either enter a verdict for the plaintiff or defendant, or order a nonsuit, as the Court might think fit. It was also agreed that the Court should have the power to determine the equities, if any, and order a sale of the ship, and an account of the proceeds, disbursements and earnings thereof since the transfer to the plaintiff, and pay the proceeds into Court to abide the judgment. We are therefore called upon under the rule not only to decide the law, but also to decide the facts and equities of this case.

It was objected at the argument that replevin would not lie for want of possession of the ship in the plaintiff before this action was brought, it being contended that while the ship remained in the custody of the sheriff, under the execution against *Wm. Short*, no possession could be given by *Benjamin Short* to the plaintiff, and that the bill of sale from *Benjamin Short* to the plaintiff passed no title. This objection would have been unanswerable if the executions that were levied on the ship had been against *Benjamin Short*, the registered owner, but as the seizure was made under executions against *Wm. Short*, it cannot, I think, be pretended that such seizure precluded *Benjamin Short* assuming that he was the owner, as I think he was in law, from transferring his property in the ship to the plaintiff, and I have therefore no doubt that the possession which the plaintiff received from *Benjamin Short* of the ship was sufficient under the ruling of a majority of this Court to enable him to maintain the present action of replevin. The case of *Lane v. Dorsey*, and other cases which have been decided and reported, must, it appears to me, until over-ruled, settle the principle involved in this objection. In these cases it has been held, as I think correctly, under chap. 134, sec. 174, of the *Revised Statutes*, 3rd series, that replevin will lie for goods and chattels that have been in the possession of the plaintiff and wrongfully taken, or where lawfully taken or received have been unlawfully withheld; here possession of the *Arthabaska*, accompanied by a bill of sale, was delivered by *Benjamin Short*, the registered owner, to the plaintiff, and that, I think, was enough to enable the plaintiff to proceed against the defendant in this form of action.

Secondly, it was contended that the bill of sale from the sheriff to the defendant, though not registered, passed the title in the ship to the defendant, inasmuch as there was evidence leading to the conclusion that *Wm. Short* was in point of fact the owner, and that the register of the ship was obtained by *Benjamin Short*, through collusion between his father and himself, and with the view of fraudulently securing the ship against the just claims of the creditors of the father. Whether we have the power of dealing with the question of fraud and collusion between the father and the son here



imputed, is a matter on which we must satisfy our minds before we proceed to consider the subject, and for this purpose it may be proper to refer to the pleadings. Now the pleas put in by the defendant to the plaintiff's writ and declaration are as follow:—1. Non cepit; 2. That defendant did not detain the ship, her tackle, &c.; 3. That the ship, her tackle, apparel and furniture, were the goods of the defendant, and not the goods of the plaintiff; 4. That the ship, &c., were not at the time of the supposed taking by defendant, nor had they ever been in the possession of the plaintiff; 5. The defendant justifies the seizing and taking of the ship, &c., under an execution at the suit of *Charles G. Turnbull* and another, and also under a second execution at the suit of the defendant and one *Duncan Robertson* against *Wm. Short*, in which it is averred "that at the respective times of issuing these executions, and until the times of the respective levies thereunder, the ship *Athabaska* was registered at the port of *Digby* in the name of *Benjamin Short*, as owner thereof, but that the ship, her tackle, &c., were really the property of *Wm. Short*, and the registry was falsely and fraudulently procured and continued for and by *Benjamin Short* in collusion with *Wm. Short*, for the purpose of securing the *Arthabaska* from being seized and taken in execution by and at the suit of any creditor of *Wm. Short*, and for the purpose of defeating his creditors, and that for these fraudulent purposes *Benjamin Short* was permitted by *Wm. Short* to be and continue registered as owner, without any sufficient or legal consideration moving from *Benjamin Short* to *Wm. Short*, and that the vessel so being and continuing collusively and fraudulently registered in the name of *Benjamin Short* as owner, but being really and truly the property of *Wm. Short*, and liable to be seized under the executions, the sheriff duly levied on and seized the ship, &c., under the executions, and continued in possession, and duly advertised the same for sale under the executions, and on the 2nd of *September*, 1867, in pursuance of the advertisement, duly offered all the right, title and interest of *Wm. Short* in the ship, for sale at public auction, and that the defendant being the highest bidder became the purchaser, and the ship, &c., were then and there sold and delivered by the sheriff to the

defendant, who retained the possession of her." The last plea raises the question of fraud and collusion between *Benjamin Short* and *Wm. Short* as to the obtaining a register of the *Arthabaska* by *Benjamin Short* in his own name, and although there may not be sufficient evidence to establish this charge, there is at least evidence to show that the dealings of *Benjamin* and *Wm. Short*, and the means taken by them to obtain supplies and materials for the building of the ship were not creditable to them as business men, and were such as were calculated to create great doubt whether *Benjamin Short*, if interested at all, was the sole owner of the ship. It is true there is evidence to show that *Benjamin Short* employed the workmen and took an active part with his brother and partner; *F. Short*, in the building of the vessel, but the letters addressed by *Wm. Short* to *Messrs. Turnbull & Co.* from time to time for supplies, with the knowledge of *B. & F. Short*, representing himself as the builder and owner of the vessel; the fact of his having purchased from the defendant and his partner the sails, rigging, &c., for the vessel on his own credit and responsibility, and his admission to the defendant in *September, 1865*, "that *Wm. Short* was building the vessel at *Bear River*," all go to show that if not wholly he was largely interested in the building of the vessel. If he was not then the only conclusion from all these circumstances is that *Wm. Short* as well as *Benjamin Short* practised deception and fraud upon those from whom they obtained the supplies used in the building and outfits of the ship. That *Wm. Short* induced those with whom he dealt to believe that he was building the vessel for and on his own account there can be no doubt. First of all the defendant in his direct examination says that the goods supplied by himself and his partner were delivered to *Wm. Short* on the faith of the representations he made to them. In his cross-examination he says; "I made the advance on the faith of *Wm. Short's* credit, and of a lien on the ship; I thought I had a lien; I charged the goods to *Wm. Short* for brigantine, leaving the name blank, as it still remains in our books; I did not know that there was such a person as *Benjamin Short*." *Thomas R. Jones* says; "*Wm. Short* told me in *May, 1865*, when he owed me \$600, that he had a good many debts, and was going

to build a ship which he would have off in the fall and pay me." Again he says; "I saw *Benjamin Short* in *October*, 1865, and he got a small lot of goods from me for *Wm. Short*, the last I gave; he told me his father was very busy in getting his vessel ready for launching, and that he could not come over on that account; he wanted more goods than I would give him; I had no suspicion at that time; I delivered the goods on the faith of these representations, the whole transaction was based on them; I would not have given him a cent's worth otherwise." *W. W. Turnbull* says; "I saw *Wm. Short* on the 22nd *May*, 1866 at *Bear River*; I wanted to get security for our debt; he declined either to pay or secure me." Witness read a memorandum made by him at the time, to which he says *Wm. Short* assented; it contained a promise to pay his debt in 1866, *if nothing happened to the vessel*, and he adds; "*Wm. Short* said he told me in confidence that *Beard* and *Vinning* had got judgment against him, but there was nothing to levy on as he had put his property so as it could not be touched." *Henry Crowse* says "he lived at *Bear River* in 1865; the business was carried on about five years ago in the name of *Wm. Short & Son*, all three were working together; I saw no difference in the mode of carrying on business in 1865; I think the sign at first was *Wm. Short & Son*; that sign was taken down about the time they commenced the ship, when the sign was *Benjamin Short*; I saw *Wm. Short* about the building of the ship; one day I saw him giving directions about laying some timber; I built the shop about two or three years before; all three paid me; *Wm. Short* and *Benjamin Short* hired me; they called the shop theirs." Looking at all the evidence in this case I must say that the impression made on my mind is that *Wm. Short*, if not the sole owner of the ship, had at all events a large interest in the ship, which ought to have been inserted and set forth in the register, and as the rule entered into between the parties in this case has given this Court the power of dealing with the equities on both sides, I think the sale of the ship, and the distribution of the proceeds in the manner stated by His Lordship the Chief Justice among the several creditors from whom the supplies for the building of the ship were obtained, is under all the circumstances best calculated

to do justice on both sides, and for that reason I concur in the judgment he has delivered.

JOHNSTON, E. J.—I have a good deal of doubt whether the plaintiff has not failed on the pleas of *non cepit* and possession, and whether, therefore, under the rule a judgment of non-suit ought not to be entered. But I abstain from a positive opinion on these points. Were these doubts to be confirmed on further investigation, a very injurious result to both parties might be the consequence, for nothing could be worse for the interests of both than that no judgment should be arrived at owing to division of opinion on the bench.

Concurring generally in the view of the law taken by the learned Chief Justice, and which, I understand, asserts the general principle that the register of a ship is *prima facie* evidence of title, I confine myself to the facts, the nature and effect of which I am disposed to carry somewhat further than His Lordship has done. I turn then to the material question of fact, and I am clearly of opinion that fraud between Wm. and Benjamin Short in relation to the vessel in controversy and the *New Brunswick* creditors, has been established against both of them. This opinion depends, not upon any particular language used by either, but is founded on what to my mind is an inevitable conclusion, from the general course of their conduct. There may be, however, some question as to the character and extent of the fraudulent purposes of these two persons, and two hypotheses are open on the evidence. One of these is that they started with honest purposes, having a mutual interest in the building of the ship, and each devoting all his means and credit toward forwarding the common object. William, the father, procuring supplies on his credit from *St. John*, and Benjamin, the son, procuring supplies on his credit from *Halifax*, the supplies from all sources going to the same objects, the furnishing of the store kept in Benjamin and F. Short's name, and the building of the vessel, and that it was only when the burden threatened to be too heavy, and creditors of William were urgent, that that it was fraudulently concerted between them to defeat the *St. John* creditors by putting the vessel in Benjamin's name, and, (when the emergency became pressing) by trans-

ferring her to the *Halifax* creditors, with a reservation in favor of *Benjamin* of the excess of the proceeds. The other hypothesis is that there was a fraudulent purpose from the beginning, that each should procure supplies to the extent of his credit, and that the vessel should be dealt with in such sort as would enhance the credit of each, and be ultimately so disposed of as circumstances might indicate for their advantage.

The circumstances appear to me utterly inexplicable except on one or the other of these suppositions. If *Benjamin* was the sole person interested in the store and building of the vessel, what were *William's* motives and object in involving himself in debt for the purposes either of the store or the building? And if *William* had no share in the vessel, out of what funds was he to pay the debts he had contracted for building her? And again, if *Benjamin* was solely interested, what did he mean by putting on his vessel the iron, the anchors, the rigging, and the sails that he had not bought, standing by through the whole season and seeing his father personally and by letters, some signed by himself and some by his brother *F.*, the ostensible partner of *Benjamin*, soliciting and obtaining these articles from *St. John*; and yet more, *Benjamin* himself going to *St. John* for the same purpose, and excusing his father's absence on the ground that he was too busily engaged on the vessel to leave home? The only answer can be that *Benjamin* was the debtor of *William* for those supplies. This is a very unnatural supposition between father and son, compared with the more probable idea that they were mutually interested. The mortgage from *Benjamin* to *William* may be urged in support of that view; but it only increases the difficulty. The mortgage in that view represented the debts of the *St. John* creditors, and *William* was but the instrument on their behalf. Both *William* and *Benjamin*, if the mortgage was an honest transaction, knew that it was the *St. John* creditors who were interested in it. But the mortgage disappeared, and it disappeared for the purpose of making room for a sale which, had it not been interfered with, might have left both *Halifax* and *St. John* creditors in the same unprotected plight as regarded their large debts. As a juror I desire no more

testimony to satisfy me of the fraud between the father and son to defeat the *St. John* creditors, than *Benjamin's* cognizance of the circumstances under which the supplies were obtained from them; his putting those supplies on the vessel; recognizing the right of the *St. John* creditors to be protected on the vessel by giving the mortgage to his father; consenting to the release of that mortgage without substituting any other security for their protection, and when they became the urgent creditors, calling in the *Halifax* creditors and giving them the title of the vessel, with a reservation of the surplus to himself. These circumstances, unexplained, are to me sufficient proof, and being unexplained, when they might have been explained, they are to be taken with every inference they can reasonably bear against the *Shorts*, because they were present and might have been examined, and were not examined.

The excuse given at the argument by one of the counsel was that *Benjamin*, not being on the record, had no right to ask to be examined. He might have offered. But who that reads the minutes, and sees the efforts made on the part of the plaintiff, by the examination of many witnesses, to meet the question of fraud charged in respect to the ownership of the vessel, can believe that if *Benjamin* and *William Short* could have explained the circumstances favorably for themselves and the plaintiff they would not have been examined? and surely they were competent witnesses.

We are at liberty to adopt either of these views, and by accepting that which involves the less degree of moral guilt for the *Shorts*, we shall not do other than is generally proper under similar circumstances. *William* and *Benjamin* are thus established to have been mutually interested in the vessel when the debts were contracted, and the vessel, for the construction of which the debts were contracted, was then legitimate security, and would have continued to be that security but for the fraudulent departure of the *Shorts* from their original purpose.

In the view of equity, and acting on the equitable power conferred by the rule, the parties affected by the fraud should be restored by this Court to their just relations to the vessel, and the creditors in *New Brunswick* and *Halifax* participate

rateably in her proceeds; nor can the advantage gained by the *Halifax* creditors by the bill of sale—from *Benjamin*—if advantage they did gain, militate against this view of the subject, seeing that they had, or ought to have had, full knowledge of the opposing equities when they took from *Benjamin* a bill of sale for their and his benefit, for he who purchases property at the moment the sheriff's hammer, at an advertised auction, is on the point of falling, on the idea that the officer of the law is unauthorised, assumes the burden of meeting the opposing claim in all its aspects.

I concur in the disposition of the vessel, and the appropriation of the proceeds intimated by His Lordship the Chief Justice.

WILKINS, J.—One of the points raised by the pleadings and taken at the argument was, "that under the facts in proof," the action was misconceived. It is indisputable that the sheriff, having the custody of the vessel in question, (legally or illegally is, of course, immaterial as regards the point in question,) transmitted his actual possession of her to the defendant, and that out of the possession of the latter she was taken under the replevin writ, and delivered to the plaintiff. Thus, the possession of her which the defendant had when the writ was executed was not in any manner derived from the plaintiff, and from him she was never taken in any sense. The rule of the Common Law, then, as established by *Mennie v. Blake*, 6 El. & Bl., 642, governs the question if that rule be in force in this Province. Having given an elaborate opinion in support of that hypothesis in the case of *Lane v. Dorsay*, I shall do little more, now, than refer to it. In that opinion I was supported by the learned Judge in Equity, while no one of the Judges who in that case thought, (as I did not think,) that replevin would lie in the facts there in evidence, expressed an opinion that it would lie in the same state of facts that we have before us.

The judgment of the Court did not determine in *Lane v. Dorsay*, nor could it have determined, without rejecting words which occur in our statute, and which demand for their application to a given case an actual taking of some sort or other by him against whom the writ issues from him who issues it,

"that where there had been, as in this case, no such taking of the goods at all, replevin would lie." In the printed report of that case the learned Chief Justice is stated thus to have expressed himself, viz ; "I would not go the length of the *American* courts, extending the action to all cases where chattels in the possession of one person have been claimed by another, because our Act, as I read it, does not go so far as that, and I would not disturb by this summary proceeding a possession not derived from the plaintiff." The learned Chief Justice thus plainly and expressly reserved from his judgment that very case with which we are now dealing. The only opinion expressed by my learned brother *Dodd*, "that the Legislature had extended the Common Law remedy." How far it had been extended that learned Judge did not state. The conclusion of his mind appears thus stated ; "I am, therefore, of opinion that our Provincial Act extends the Common Law remedy, and gives a party the writ of replevin where there is an unlawful detention, notwithstanding *the original taking may have been lawful*." This is in the very words of the statute which, as already observed, necessarily suppose *an original taking*. My learned brother *DesBarres* is reported to have thus spoken, as a reason why replevin would not lie in that case for the fish ; "I do not think replevin can be maintained for the mackerel, *the plaintiff never having been in the actual possession of such fish until they were delivered to him by the sheriff under the writ*." Here I must be permitted to pause for a moment and ask how, when and where, this plaintiff was ever in the actual possession of this vessel until she was delivered to him by the sheriff. Our Legislature has not only *not* said "that replevin may be brought wherever there has been a mere wrongful detainer," and said that alone which, of course, it would have said if such had been its intention, but, as if to preclude a question, has, in specifying the cases in which it may be brought, mentioned an "*original taking*" in relation to a subsequent detainer. Surely, a plainer expression of intention, positively and negatively, no form of words could frame ! A necessity for *declaring* the Common Law rule plainly existed. Opinions on this side the water were at direct variance with those that prevailed in *England*. In



*Evans v. Elliott*, 5 Ad. & El., 142, Lord Denman had said on demurrer, where there had been an original lawful taking, but *no taking in fact* after tender of rent and expenses, but merely a detention. "Every unlawful detention is a taking." The Court held that in the legal idea of a "detainer," in itself unlawful, but preceded by a lawful taking of a chattel a new taking was involved. In *Gardner v. Gardner*, on the contrary, a decision in the Supreme Court of *New York*, reported in 15 *Johnson*, 402, the *American* court, in direct opposition to the *English* case, had decided "that a person from whom there had been originally *taken*, under lawful authority, goods to recover back which replevin was brought after he had paid the debt for which they had been lawfully taken, and the authority to detain had, therefore, been determined, could not maintain the action." Thus, in expounding the Common Law in states of facts identical, the *English* court had decided that replevin would lie, and the *American* court that it would not lie. These contrary decisions had been given relatively to that very state of facts stated in our statute.

This is not merely a question about the form of an action in which nothing of substance is involved. The lucid judgment in *Mennie v. Blake*, has clearly shown that if this action, really brought to determine a right to a chattel, had been in form Trespass or Trover, this defendant would have enjoyed, by the Common Law, a legal presumption, of the benefit of which an action of replevin deprives him. If our Legislature did intend to alter the Common Law, not merely other language than that occurring in the statute was required, but subsidiary enactments, shifting the legal presumption which characterizes replevin, were indispensably necessary.

Although the views on the form of the action which I have thus expressed, and from which, I regret, I can see no escape, render it, perhaps, unnecessary for me to make the other questions raised subjects of a judicial opinion; I have felt it proper, nevertheless, carefully to consider these last also. Viewing the rule, as I think we must view it, *in connection with the issues*, our jurisdiction over the *equities* appears to me to be limited by and to the latter. I cannot doubt but that such was the understanding of the parties, as

the learned Chief Justice informs us, that "the whole matter" was withdrawn from the consideration of the jury solely because time did not remain to permit the trial to proceed to its regular conclusion. If so limited we can only inquire, first, whether *William Short* was, as alleged, the sole owner; and, (if he was,) secondly, whether registration of the vessel was so fraudulently obtained by *Benjamin Short*, in collusion with *William*, that the certificate of registry obtained by the former was null and void. No issue having raised a question of partnership in *Benjamin* or in *William*, I do not consider that it is competent for the Court under the rule, to adjudicate on that question. No pleading asserts that *Benjamin Short*, in order to obtain the registry, made a declaration of ownership false in part, that is to say, that he was sole owner, while in fact *William* was a part owner. Even if that allegation was found on the issue roll, I should not be prepared to say, and I have found no case that would authorise me to say, that the clearest proof substantiating it would warrant a court of equity to pronounce the registration obtained on that declaration by *Benjamin Short* an absolute nullity. Had an allegation "that such false declaration had been made by him" appeared on the pleadings, and been proved, and had no collusion on the part of *William* marked the case, *Benjamin* could no doubt, especially since the enactment of sec. 3 of chap. 63 of the 25 & 26 *Victoria*, be held by equity to be trustee for *William*, in respect of the shares of the latter in the vessel, if *William* had been shown to be entitled to them. In *Orr v. Dickinson*, the bill of sale registered was an absolute nullity, as much so as if a forgery; and the decree of the Court, therefore, annulled the registry. In the *New Brunswick* case of *McLean v. Grant*, the registry, proved to have been obtained by fraud, and by a false declaration of ownership, was declared null and void by a Court of Common Law. So in *Michael v. Fripp*, 19 L. J. R., N. S., 259, V. C. *Malins* decided, that the bill of sale being proved to be, beyond question, *absolutely void*, and the registry granted in respect thereof being only *prima facie* proof of ownership, the latter was, as it was decreed to be, *a complete nullity*. In all these cases fraud and falsity were not inferred by the Court from doubtful evidence, but proved positively and in no

one of them could "truth" be predicated of any part of the declaration on which the registry in question was obtained. By the rule on file the Court is empowered to determine the facts on the evidence, and to draw inferences, but this power is conferred, in order to decide on the rival claims of ownership of this vessel, and what we are called on to decide is, "whether *Benjamin Short*, who is the registered owner, who, as such, is declared by section 43 of the *Registry Act*, "to have power absolutely to dispose of her according to the provisions of the Statute," and who, as such, did so dispose of her to the plaintiff, was, in respect of fraud committed by him in making himself such, so incapacitated from disposing of her, that a court of law or of equity could declare his transfer of her *absolutely void*. Now, after the most careful review of the evidence, my mind is not, from the effect of it, brought to that conclusion. On principle, I think I ought not to adopt it unless I perceived, (and I fail to perceive,) *cogent and irresistible evidence*, first, that *William Short* was originally the sole owner of the vessel in question; and, secondly, that (*William* being such sole owner,) *Benjamin Short*, in collusion with *William*, falsely and fraudulently declared himself to be the sole owner, and so obtained a registry of her, in his own name. I cannot bring myself to believe that a court of equity, appealed to by these creditors of *William Short*, and asked to decree the plaintiff's bill of sale from *Benjamin Short* a nullity, could, or would make such a decree, upon that evidence which we have before us. It must be conclusive evidence alone which, in view of section 43 to which I have adverted, could warrant this registry—*annulling* interposition of a court of equity. The policy of the *Merchant Seaman's Act* would be contravened, if evidence of inferior degree were held sufficient to sanction such interposition, in the case of an enactment so decisive as that section which, in its application to the case before us, fixes, *prima facie*, the title of *Benjamin Short*, and that of the plaintiff claiming under him. We must consider, besides, that if *Benjamin Short's* interest, at the time of his transfer to the plaintiff, was valid, to the extent of thirty-two shares, or of any number of shares, the whole of that interest is available to the plaintiff, to respond his claim on *Benjamin Short*, and if in the money

value of that interest there be any excess, the excess belongs to *Benjamin Short* and not to *William Short's* estate, or to the defendant under his title derived from the Sheriff's sale. On what principle then could that interest be decreed to be sold for the common and equal benefits of plaintiff and defendant. But, suppose, under the rule, this Court had an *equitable* jurisdiction over the subject matter, *not qualified by the pleadings*, I should, nevertheless, feel it impossible to arrive at any other conclusion than that which I have intimated. After being made acquainted with the opinion of the learned Chief Justice, which supposes our equitable discretion to be unrestrained, I perceive that that learned Judge finds, as I do, the evidence to consist of acts and things done, and words and declarations uttered and written, by *William Short* or *Benjamin Short*, in relation to the vessel, warranting inferences, more or less strong, on the point of ownership. The learned Chief Justice considers them, I must presume, to be nearly balanced, as he would decree a distribution of the proceeds of a sale ordered, based on an assumed equality of beneficial interests in these two men, in regard to the vessel in question. I search absolutely in vain for tangible evidence of any beneficial interest in this vessel ever having been in *William Short*. I may strongly suspect that he had some beneficial interest in her, and that, in collusion with him, to defeat his creditors, and with his knowledge and sanction, *Benjamin* became, by fraud, the sole registered owner of her, but I see nothing in the evidence which necessarily leads to that conclusion. There is absolutely nothing to indicate the measure of his interest, if he had any. The learned Chief Justice remarks: "that the rule imposes on the Court an invidious office to draw inferences where fraud is the substratum of the defence." I must go further and say, that to draw such inferences, unless I find they are irresistible, in order to establish an alleged fraud, and that, for the purpose of annulling a registered *prima facie* title to a British ship, thereby depriving him, who has it by virtue of a statute, of a substantial advantage and interest which he has acquired, is, in my opinion, beyond any judicial competency.

I cannot, however, content myself with expressing, thus negatively, my estimate of the evidence on the point of

ownership. I must assert my conviction that it greatly preponderates in support of the justice of the claim set up by *Benjamin*, to the sole ownership of this vessel at the time of her transfer to the plaintiff. The only circumstance in the testimony of real suspicion as respects the moral right of *Benjamin*, attaches to the fact of his having, immediately on the completion of the ship, mortgaged her for a large sum to *William*. But why was not this made the subject of enquiry at the trial by those who asserted fraud on the part of *Benjamin*, in relation to his declaration of ownership? *Benjamin* was in Court, it appears, and could have been called on to explain this. Looking through the whole of the evidence of acts and declarations relied on to show *Benjamin's* fraud, I do not find him ever brought into contact with any of the acts of *William*, nor do I find him shown to be privy to any of *William's* declarations or correspondence. The whole of this took place behind the back, and without the proved knowledge of him who had, by a declaration as solemn as if on oath, made himself the sole registered owner. This evidence, admitted it seems, without objection, is not, in my judgment, sufficient to establish the alleged fraud in *Benjamin*, much less to warrant a court of equity to annul the registry of his statutory title.

I conclude, then, that the title of the plaintiff to the vessel in question, subject to his agreement with *Benjamin Short*, is not successfully impeached by the evidence, and that it is not affected by or subject to any rights, or interests, legal or equitable, shown in the defendant.

The plaintiff would, therefore, if he had not misconceived the form of action which he had adopted, have been, in my opinion, entitled to judgment.

DODD, J.—Replevin for the ship *Arthabaska*, her tackle, apparel and furniture, tried before the Chief Justice at *Digby*, when it was agreed that the whole case should be decided by the Court after argument, without taking the opinion of the jury upon it. The cause was argued at the last *December* term. The issues raised by the pleadings are; *First*, a denial of taking the ship, &c.; *Second*, that defendant did not detain the ship, &c.; *Third*, that the ship, &c., were the goods of the

defendant and not the goods of the plaintiff; *Fourth*, that the said ship, &c., were not at the time of the supposed taking thereof by the defendant, nor have they ever been in the possession of the plaintiff; *Fifth*, justifies under certain judgments against *William Short* upon which executions were issued, and at the time of the respective issue of such execution against the said *William Short* the said ship *Arthabaska* was registered at the port of *Digby, N. S.*, in the name of *Benjamin Short* as owner thereof, but that the said ship, &c., were really and truly the property of the said *William Short*, and that the said registry was falsely and fraudulently procured and continued for and by the said *Benjamin Short*, in collusion with the said *William Short*, for the purpose of securing the said ship *Arthabaska* from being seized, attached, or taken in execution by or at the suit of any of the creditors of the said *William Short*, and for the purpose of defeating and defrauding his said creditors, and for the said fraudulent purposes the said *Benjamin Short* was permitted by the said *William Short* to be and continue registered owner of the said ship, &c., and that the said ship, &c., in reality being the property of the said *William Short*, and liable to be seized under the said executions, and that the sheriff, &c., within his precinct duly levied on and seized the said ship under the said execution, and that after such levy and while the said vessel was advertised for sale under the same, and still in the possession of the sheriff, the said *Benjamin Short* by a bill of sale executed, fraudulently assumed to convey the said ship, &c., to the plaintiffs herein; that on the 2nd *September*, 1867, in pursuance of the said advertisements, the said sheriff duly offered for sale all the right, title and interest of the said *William Short* in the said ship, &c., at public auction, and that the said defendant then and there being the highest bidder at such sale, became the purchaser of the said ship, &c., and was then and there by the said sheriff delivered to him, the said defendant, which is the supposed taking and detaining complained of in the declaration. This fifth plea raises the important issue of fraud and collusion between *Benjamin* and *William Short*, and if it is supported by evidence, then in that case the plaintiff must fail in his action. This registry of the vessel to *Benjamin* is the foundation of

the plaintiffs' title to her, and if he was not the true owner when he obtained the registry, but that in reality the vessel was the property of *William Short*, in that case the sale by sheriff of *William Short's* interest would pass the vessel to the defendant, and the registry to *Benjamin* would be valueless, null and void, and the bill of sale to the plaintiff would equally be so.

Courts of Law in general are bound to presume, *prima facie*, in favor of deeds which appear to have been duly executed, and this rule will apply to the bill of sale to plaintiff; but admitting that to be *bona fide* between the parties to it, still it is necessary to go back to the registry and show that was also *bona fide*. *Prima facie*, it clearly represents the title in the vessel to be in *Benjamin*, and it rests with the defendant to impeach that title, and show in the language of the fifth plea that it was obtained by fraud and collusion between *Benjamin* and *William*, and that in reality the vessel was the property of *William*. After a minute examination of the evidence, and putting myself in the place of a juror, I have come to the conclusion that the fraud and collusion charged have not been proved, and I further am of opinion that if the question of fraud had been submitted to a jury, they would have been bound to find against it; and with this view of the case, I think the sale by the sheriff, and the purchase by the defendant, passed no interest in the vessel to him.

At the argument one of the points raised and much relied upon was that replevin would not lie in this case as plaintiff had not been in possession before action brought. It is true the sheriff was in possession under an execution against *William Short*, but if I am correct in saying *William* had no interest in the vessel, then the possession of the sheriff was wrongful, and *Benjamin* had never been divested of his lawful possession until he transferred it to the plaintiff, and this he did first by bill of sale, and then, according to the evidence of *Pyke*, by going on board and giving actual possession. Here then the objection to the action ceases, as it has never been contended that for wrongfully taking personal property from the rightful possession of another, replevin will not lie.

But apart from the question of possession in the plaintiff, I held in this Court in *Lane v. Dorsay*, that the *Revised Statutes*, (3rd Series,) chap. 134, extended the Common Law remedy in action of replevin. I still entertain that opinion, and that it extends to the present case, even had the plaintiff not taken possession under his bill of sale, and therefore must decide in favor of the right of plaintiff to bring the action.

Upon the two points I have referred to, and my opinion being with the plaintiff on both, it is unnecessary to enter further into the cause, I think the verdict should be entered for plaintiff with costs.

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### THE QUEEN v. RYERSON.

CHAPTER 134, *Revised Statutes*, (3rd Series,) "Of Pleadings and Practice in the Supreme Court," section 197, in reference to the filing of bail in cases where the Judge has refused a rule nisi for an appeal, and an appeal is taken under the statute, is confined in its operation to private parties, and does not extend to the Crown.

The proceedings having been instituted in the name of the Attorney General of Canada, a rule nisi was taken out to set them aside, on the ground that the Attorney General of Canada not having been admitted a barrister or attorney under *Revised Statutes*, (3rd Series,) chapter 130, was not qualified to subscribe a writ in this Province.

*Held*, that the objection not having been taken until after a plea pleaded and a trial had, had been waived.

*Seemle*, that the signing of process in the manner excepted to, if objectionable at all, was merely an irregularity and not a nullity.

WILKINS, J., now, (January 7th, 1871,) delivered judgment:—

This cause was tried before me, and a verdict found for the defendant. On the last day of the sittings application was made to me for a rule to set aside the verdict on the ground of my having refused to admit an expert to give his opinion as to whether the stamps apparent on the note in question had been previously used. I refused the rule, being of opinion that the evidence was rightly rejected, and especially as there was no proof whatever of the defendant having affixed the stamps at all to the note, and as the defendant, put in the box by the Crown, had positively absolved himself from all criminality in respect of the offence charged. Application was then made to me on the part of



the prosecution to name a sum for which security should be given, under the Provincial Statute, and I named eighty pounds. I thus named a sum because the counsel for the Crown made the application in view of the statutable provision enabling an applicant to take a rule at his pleasure. Had he given the security, and so taken a rule, it would not have been the case of the Court imposing payment of costs on the Crown, which I thought then and think still could not be done, but the case of a plaintiff in a civil action taking a rule on voluntary performance of a condition imposed by the Legislature. Had an independent motion, without reference to the statute been made to the Court for a rule, I should have thought it ought to be granted if the Court saw sufficient grounds for it, and that no condition respecting payment of costs should be imposed. I think, moreover, that it is quite competent to the counsel for the Crown in this case to make that motion now.

As regards the motion made by the counsel for the defendant, to quash the whole proceedings as a nullity, on the ground that they were instituted not by the Provincial Attorney-General but by the Attorney-General of the *Dominion*, not being an enrolled and sworn attorney of the Court, I am of opinion that we are not called upon to consider that objection made after an appearance and plea put in by the defendant, full defence made, and a trial had, inasmuch as it is not shown certainly that the proceedings impugned are null and void. As to whether the objection would have availed if made at some earlier stage of the proceedings, I do not feel myself called upon to give any opinion. If so raised, prerogative rights and privileges of the Crown, legislation of the *Dominion* Parliament, and in connection with that the *British North America Act*, as well as our Provincial legislation and institutions, would have to be carefully considered and compared before a judicial decision could be arrived at. On this last motion I think, therefore, there can be no rule.

SIR W. YOUNG, C. J.—This action was brought on the 6th of August, 1869, by a writ claiming penalties, under the *Dominion Stamp Act*, 31 Vic., chap 9, and subscribed by *Mr. Blanchard* in the name of Her Majesty the Queen, by the Attor-

ney General, *Sir John A. McDonald*, by his express directions. Pleas were put in and the cause was tried, when a verdict was found for the defendant. Then the counsel for the Crown moved for a rule *nisi*, to set the verdict aside, which the presiding Judge refused. He was then asked to name an amount for bail, under the *Practice Act*, sec. 197, which he did; but the counsel for the Crown, on reflection, being of opinion that the Attorney-General ought not to be called upon to give bail, moved the Court in the present term for a rule *nisi*, for a new trial, and we directed an argument which was had before us on the preliminary objection. It was contended for the Crown that section 197 was confined to private parties in suits, and it did not extend to the Queen, not being named in it, and the well-known cases on that point were cited from *Bacon's Abridgement Title Prerogative*, ed. 5. See also *Chitty on Prerogative*, 366, 383. Three modern cases were also cited; *Lord Advocate v. Lord Douglas*, 9 Cl. & Fin., 186, 201, 213; *The Attorney-General of the Isle of Man v. Cowley*, 12 Moore's P. C. C., 27, 35, and the case *In Re the Attorney-General for Victoria*, L. R., 1 P. C., 147. It seems at the first blush an anomaly that the Queen should be obliged to find bail for a hearing of her own cause touching the public revenue in her Supreme Court; and had this occurred to the presiding Judge when the matter was first mooted, he would probably have paused before naming an amount. The rule is universal at Common Law, that the Crown in civil as well as criminal suits does not pay costs, although the equity of this rule has been often questioned, and it has occasionally been broken in upon by statute. In the absence of any statutable provision it applies here, but the ordering of bail as the condition of a re-hearing abrogates the rule in fact by a side-wind, and however hard it may be to the defendant, this we have no power to do. The cases cited lead to the same conclusion. In the first, which was an appeal from the Court of Session in *Scotland* to the House of Lords, it was held after an elaborate research into precedents, that the Lord Advocate for *Scotland*, while suing as such on behalf of the Crown, is not required to enter into recognizances to answer the costs of said appeal. In the second it was ordered that the Attorney-General for the Isle

of Man ought to prosecute his appeal from the Island Court to the Privy Council without giving security for costs. In the third the Privy Council extended the same principle in the year 1866 to the Attorney-General for the colony of *Victoria*. On the analogy afforded by these cases, as well as on the general principle, we think that the Attorney-General for the *Dominion* is not bound to give bail under section 197, and that he is still at liberty to move this Court for a rule *nisi* for a new trial.

A second motion was made in this case during the term, for a rule *nisi* to set aside the whole proceedings, on the ground that the Attorney-General for the *Dominion*, not having been admitted an attorney or barrister of this Court under the *Rev. Stat.*, (3rd Series,) chap. 130, could not subscribe a writ therein, and that the proceedings, therefore, being bad *ab initio*, were a nullity. It is certainly strange that this objection, if it be an objection at all which we do not deem it necessary to enquire into, should have been reserved till after pleas put in and a trial of the cause. If taken earlier it would have been easily cured by substituting the name of an attorney for that of the Attorney-General on the writ. Now that is the test which determines the character of an objection, whether it is to be regarded as a nullity or an irregularity, and if the latter it is waived by the defendant taking subsequent steps. But on looking at the cases it is very doubtful if the signing of process by a person not entitled to sign it will be treated by the Court even as an irregularity. In ——— v. *Sexton*, 1 Dowl., 180, the action was commenced by a person who was not an attorney. The case was then put into the hands of a person who was an attorney, but had not taken out his certificate. On the day before the trial a certificated attorney undertook it. Yet the judgment was upheld, and the plaintiff's costs allowed from the beginning. In *Hilleary v. Hungate*, 3 Dowl., 56, there was an application to set aside the judgment on a warrant of attorney, and the execution issued therein, and to discharge the defendant out of custody on the ground that the attorney who conducted the proceedings was not an attorney at the time, and consequently that all the proceedings were void and irregular. It appeared that the attorney had been regularly

admitted, but that he had not for over a year taken out his certificate. *Littledale, J.*, said he had found no case which decided that the proceedings are irregular because the attorney has not been regularly admitted. It would be most mischievous if such proceedings were declared to be irregular, and he discharged the rule. Many other cases have supported the principle stated in *McNamara on Nullities*, that a step taken by an attorney while uncertified and off the roll, is not on that account void, or even irregular. The Courts have refused to quash a *habeas corpus* sued out by him, 3 *Dowl.*, 529, or to cancel a bail bond because he had sued out the *capias*, 1 *D. & R.*, 215, or to discharge a rule served by him for setting aside proceedings, 2 *Mass.*, 228. On the analogy of these cases it is shown that there is not the slightest reason for holding the objection in this case, were it good in itself, as a nullity; and if an irregularity it had been waived. We decline, therefore, granting the rule *nisi* moved for.

RITCHIE, J.—An irregularity in its most general sense is the technical term for every defect in practical proceedings or the mode of conducting an action or defence as distinguishable from faults in pleading, which can only be objected to by demurrer or motion in arrest of judgment, or by writ of error; 3 *Chitt. Gen. Pr.*, 509. It is the want of adherence to some prescribed rule or mode of proceeding, and in its more limited and common sense it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it at an unseasonable time or in an improper manner; *Tidd's Prac.*, 512, 9 ed. A defect is here supposed, but one that does not take away the foundation or authority for the proceeding, or apply to its whole operation; per *Coleridge, J.*, 9 *Dow.*, 595. This distinguishes an irregularity from a nullity, which is the highest degree of an irregularity in the most extensive sense of that term, and is such a defect as renders the proceedings in which it occurs totally null and void, and of no avail or effect whatever, and incapable of being made so. See 2 *Ch. Arch.*, 1042, 1044.

A nullity may be defined as a proceeding that is taken without any foundation, for it is that which is essentially defective, on what is expressly declared to be a nullity by

statute; *p. 3*. Mesne process is only to bring the party before the Court, and if by his own act he shows that he is before the Court, such as by recognizing the appearance entered for him, the omission of the service is remedied; *p. 7*. The doctrine that a nullity can be waived is certainly true in the strict sense of waiver, but this must not be carried so far as that at any period, or under any circumstances, this objection must of necessity be available. And it is not to be supposed, observes *Mr. Chitty*, *Gen. Prac.*, vol. 3rd, 552, that if a defendant plead in bar, and there has been a regular trial and verdict, that the latter, or that judgment and execution thereon, would afterwards be set aside on the ground that no formal appearance was entered for defendant. After having entered an appearance defendant cannot object to the process or service thereof; *p. 45, (63)*. A step taken by an attorney while uncertified or off the roll, is not void or even irregular on that account. That the Court has refused to set aside a judgment obtained by him; *Smith v. Wilson*, 1 Dow., 545; — *v. Sexton*, *ibid*, 180; *Hilleary v. Hungate*, 3 Dow., 56; to quash a *habeas corpus* sued out by him, 3 Dow., 529; to cancel a bail-bond because he had sued out the *capias*, 1 D. & R., 215; and to discharge a rule served by him for setting aside proceedings, 2 *Marshall*, 228.

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### RICHARDSON ET AL. v. TWINING ET AL.

PLAINTIFFS, merchants doing business in Boston, U. S., shipped a quantity of oil to A. & Co., merchants in Halifax, N. S. Between the shipment of the oil, and its arrival at the latter port, A. & Co. having become insolvent, but previous to their assignment, for the purpose of protecting the shippers, and without any intention of accepting or taking delivery of the oil, or exercising any control over it on their own account, by a custom-house order made before the goods were discharged, transferred the oil, together with the bill of lading to G. & Co., to be held for and on account of the shippers.

The oil having been claimed by the creditors of A. & Co. under the assignment,

*Held*, that the *transitus* had not been completed, and that the stoppage by G. & Co. acting for the plaintiffs, was good.     &

DESBARRES, J., now, (January 7th, 1871.) delivered the judgment of the Court:—

This was an action of trover tried before Mr. Justice *Dodd* without a jury, and submitted, with the consent of the parties,

for the decision of the Court, upon the law and facts of the case. The plaintiffs, merchants, doing business in the city of *Boston*, on the 29th of *October*, 1867, shipped *per steamer* "*Alhambra*," to *Messrs. Archibald & Co.*, then carrying on business as merchants in this city, fifty-seven casks of kerosine oil previously ordered by them, which, on its arrival here, they refused to accept, having between the shipment and arrival of the oil at this port, become insolvent. For the purpose of protecting the interest of the shippers, and without any intention of accepting or taking delivery of the oil, or exercising any control over it on their own account, *Messrs. Archibald & Co.*, by a custom-house order, made before the goods were discharged, dated on the 1st *November*, 1867, transferred to *Messrs. Graham & Co.*, of this city, together with the bill of lading, the fifty-seven casks of oil, to be held for and on account of the shippers, having previously determined not to receive the oil, and, through a member of their firm, stated to *Graham & Co.* their embarrassment in business and expressed to them their desire that they would take the oil when it arrived and dispose of it for and on account of the shippers. This *Graham & Co.* agreed to do. This oil, with the exception of that part of it which was held by the ship's agent for the freight was, on the day of the transfer to *Graham & Co.*, placed by *Archibald & Co.* in a bonded warehouse called the "*Chebucto*," for the use and benefit of the shippers. After the goods were so transferred to *Graham & Co.*, and warehoused for and on account of the shippers, *Messrs. Archibald & Co.* made a general assignment of all their effects to the defendants for the benefit of their creditors. Under the assignment the defendants claimed the oil for the benefit of the creditors of *Archibald & Co.*, and, by an arrangement made between the defendants as assignees of *Archibald & Co.* and *Graham & Co.* as agents of the shippers, it was agreed that the defendants should sell the goods, and, after deducting the expenses, pay over the proceeds into a bank in this city, subject to the plaintiffs' claim. The goods were accordingly sold under this agreement about ten days after the transfer to *Graham & Co.*, and the proceeds paid into bank where it awaits the final decision of this Court.

These being the main and leading facts of the case, which are not disputed, the first question to be disposed of is whether the transaction was at an end, and the plaintiffs' right as the shipper to stop the goods had ceased. Secondly, whether the acts done by *Archibald & Co.* in relation to the goods amounted to a taking possession by them of the goods as the owners; or, whether their acts were done in good faith, solely for the purpose and with the intent of warehousing them for the use and benefit of the shippers who, under the circumstances, certainly had very strong claims upon them for protection.

That the vendor has a right, if unpaid and if the vendee be insolvent to retake the goods before they are actually delivered, is a principal too clear to admit of any doubt. The doctrine of stoppage in transit is thus laid down by Lord *Romilly*, M. R., in the case of *Fraser v. Witt*, cited at the argument, and decided as late as 1868, Law Reports, 1 Equity cases, 69: "It is the right which the seller of goods has, after they have been sold and despatched to the buyer, to stop them at any time before they have been delivered to the buyer, if the buyer has not paid for the goods, and has in the mean time become insolvent. The real and indeed the only question in all these cases is, whether the transitus is over; in other words, whether the goods have been delivered to the buyer. If they have, then the right to stop is gone, and the only remedy of the seller is by an action at law, by proof against the estate of the buyer."

Now the only difficulty in this case, if there be any, is whether there was in point of fact any delivery of the goods to *Archibald & Co.*, that is, such a delivery as would make the goods their own, and, being their own, pass to their assignees.

It was urged at the argument that the acts of *Archibald & Co.* amounted to an actual acceptance and possession of the goods for themselves as owners, and, if the evidence will warrant such a conclusion, then the plaintiffs have clearly lost their right to stop the goods, and are not entitled to recover. But it does not follow that because *Archibald & Co.* made the custom-house transfer, and endorsed the bill of lading to *Graham & Co.*, and made the entry for the warehousing of

the goods, that these acts must necessarily be assumed to have been done by them as owners. The important question is, with what intent these acts were done, and that intent can only be gathered from the evidence in the case upon which we have to decide. The case of *James v. Griffin* 2 M. & W., 623, is an extremely strong case in point, and seems to me conclusive on the question now under consideration. These goods, consisting of lead, were consigned to A., deliverable at the river *Thames*. On the arrival of the vessel in the river, the captain pressed A. to have them delivered immediately. A, in consequence sent B, his son, with *directions to land them at a wharf where he was accustomed to have goods landed for him and kept until he carted them away to his customers in his own cart*; but A, being insolvent at the time, told B he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were, by B's (the son's) direction, landed at the wharf and there stopped in transitu by the vendor. In trover for the goods by the assignees in bankruptcy of A, against the wharfinger, it was held, (Lord Abinger, C. B., dissenting,) that the declarations so made by A to B, were admissible in evidence, although they were not communicated to the vendor or to the wharfinger; and that they shewed that A had not taken possession of the goods as owner, and that therefore the transitus was not determined.

The question left to the jury in that case was whether the acts done amounted to a taking of possession of the lead, and that is precisely the question we have to ask ourselves in this case, called upon as we are to pass upon the facts as well as the law of the case, viz.: Did the acts done by *Archibald & Co.*, the insolvents, amount to a taking of possession of the oil as owners, in other words *quo animo*, were these acts done. Now what is the evidence here upon this point? In the first place it appears that, *Archibald & Co.*, finding they were about to fail, and being already indebted to the plaintiffs in \$600 or \$800, were most anxious to, and endeavored to stop the shipment of the goods by the plaintiffs, and to that end countermanded by telegram, their order to ship them. *John Archibald* states: "When the oil arrived in *Halifax* I mentioned the circumstances of the case to some of our creditors,



and transferred by a custom house order to *Graham & Co.*, and told them the circumstances of the case, and that I wished them to hold the oil on account of the shippers, and the funds remitted, as soon as possible, which they agreed to do, part of the oil was then in our store, and part in the hands of the vessel's agent; we had not made our general assignment to the defendants when I requested *Graham* to take the oil. I had fully determined to stop our business before the oil arrived. I am certain the notice to our creditors was then out. *I did not accept the oil when it arrived for our firm.*

*We had decided, before the oil arrived, to hand it over to other parties, for the benefit of the shippers, after consulting other persons.*" In his cross-examination he says: "I sent the order for the oil about a week before it was shipped, it came in one of the *Boston* steamers. I think it arrived on Thursday, and the next morning we transferred to *Graham & Co.* We bonded what we put in our warehouse. I cannot say how much, 12 or 14 casks, did not pay the freight. I made a bonding entry of the oil, made it the same morning with the transfer to *Graham & Co.*, made it at the same time. *I had given a transfer to Graham & Co., before any part of the oil left the vessel.* This was on the 1st of November. There was a meeting of our creditors, I think, on the same day, and the present defendants were appointed assignees. We had agreed to stop our business on the Tuesday before the arrival of the oil." *Charles Graham* says: "*John Archibald spoke to me the day before he made the transfer, about the oil. Said he was getting into difficulty and wanted me to take the oil that was coming from parties in the States, and sell it for their benefit, and I consented to do so.* The next morning, about 10 o'clock, he gave me the transfer and the bill of lading. The bill of lading was then indorsed, and in his hand-writing. The Chebucto Warehouse was a bonded warehouse." *Thomas Archibald*, partner of *John*: "Was aware of the shipment of the oil from plaintiff. I knew of the telegram countermanding the shipment, that was done with my consent the evening before it was sent. We talked the matter over and feeling we should be obliged to stop, we sent it and decided to stop the same day. The oil came in a *Boston* steamer and it was entered for a warehouse, and

before it was entered we decided to transfer it to *Graham & Co.*, for the benefit of the plaintiffs, and I know it was transferred to them. This was three or four days before the general assignment. I am not certain as to the number of days, it may have been only two."

From all this evidence it appears clear and manifest to my mind, that all that *Archibald & Co.* did with, and in relation to the oil, was done for the purpose of securing it for the use and benefit of the shippers, and without any intention on their part of taking possession of and holding it as owners, for themselves; this is a much stronger case than that of *James v. Griffin*. There the consignee merely told his son, in giving him directions, to have the goods landed on the wharf, that he *did not intend to meddle with them*, and that fact was not communicated to the wharfingers at the time, who might well have supposed that the consignee was taking possession of and exercising control over them as his own, and yet that was held to be admissible, and very material evidence by all the Judges to show that the consignee had not taken possession as owner. Here *Archibald & Co.* not only decided before the arrival of the goods, not to receive them, but they even declared that intention to some of their creditors, as well as to *Graham*, that there might be no misapprehension on the subject, and when they gave the custom house order for the transfer of the goods and indorsed the bill of lading to *Graham & Co.*, they did so without any consideration, and solely with the view to enable *Graham & Co.* to deal with the goods as the property of the shippers, and nothing more. It was argued, on the part of the defendants, that the transitus was at an end, in as much as there was a part delivery of the goods to *Archibald & Co.*, the purchasers, operating as a delivery of the whole, and that as the transfer was made by them and not the vendors, the doctrine of stoppage *in transitu* did not apply here, and the case of *Whitehead v. Anderson*, 9 M. & W., 518, was cited in support of that position. In that case *Parke B.* says: "It appears to us very doubtful whether an act of making or taking samples, or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession

unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep the goods, in the nature of an agent, for custody, but he adds, 'it is unnecessary to determine this point, as there is no finding in this case, even of any act done to the timber with intent to take possession ;' " thereby recognizing the principle laid down in *James v. Griffin*, that intention was an essential element to show whether there was a possession or not, and as we are performing the functions of jurors as well as judges, we must say with what intention *Archibald & Co.* took charge of the goods, for that is to determine whether they did so as owners or as agents of the shippers, whose interest, under the circumstances of this case, they had every reason to protect.

I may here remark that the case of *Bolton v. the Lancashire and Yorkshire Railway Co.*, Law Reports, 1 C. P. 431, decided in 1866, recognizes the principle laid down in *James v. Griffin*. There *Erle*, C. J., says: "It is clear from the case of *James v. Griffin*, that the intention of the vendee to take possession, is a material fact. The question is *quo animo*, the act is done. My notion has always been that the question is whether the consignee has taken possession, not whether the captain has intended to deliver it." The case of *Coventry v. Gladstone*, Law Reports, 6 Eq. Cases 44, decided in 1868, and *Fraser v. Witt*, Law Reports, 7 Eq. Cases 64, decided in the same year, will also be found to have some bearing on the present.

Having arrived at the conclusion, after consideration of the evidence in the case that *Archibald & Co.*, the purchasers of the goods, did not, in consequence of their insolvency, accept or take possession of the goods as owners. My opinion is that the transitus was not over, and that the stoppage by *Graham & Co.*, acting as agents of the plaintiffs, who were the shippers, was good, and therefore, that the judgment of the Court must be for the plaintiff's for the value of the goods sold under the agreement, with costs.

## WHEATON v. FRANCHEVILLE.

A CONSTABLE seized a horse under a warrant of distress and endeavored to sell the same before the return day of the warrant, but was prevented from doing so, chiefly by the party from whom the horse was taken. Subsequently to the return day the constable sold the horse. Held, that the sale was valid.

DESBARRES, J., now, (January 9th, 1871,) delivered the judgment of the Court:—

The present is a mixed action for an assault upon the plaintiff, and also for taking a horse of the plaintiff's and converting it to his own use. The case was tried before Mr. Justice *Dodd*, at *Guysborough*, in *May* term, 1869, when a motion was made for a non suit upon two grounds. 1st. That there was no property in the plaintiff to enable him to maintain an action against the defendant for conversion of the horse. 2nd. That the sale of the horse under the warrant of distress issued against the defendant was illegal, because the sale was made after the warrant had expired. The learned Judge refused to non suit, reserving the points for the opinion of the full Court. The case was then submitted to the jury upon the facts, who found a verdict for the plaintiff in 5s. damages for the assault, and £6 10s. for the conversion of the horse. It was argued before us during the present term, and having taken time to consider it, the Court is now prepared to dispose of it. It appears from the Judge's report that the horse in question, being then the property of the defendant, was, on the 11th day of *September*, 1865, levied upon and seized by a constable under a warrant of distress issued on the 22nd day of *August*, 1865, by *James Tory*, a Magistrate for the County of *Guysborough*, for a school rate assessed upon the defendant, for section No. 1 in the Town of *Guysborough*. Advertisements were put up by the constable on the same day the horse was seized, advertising the sale for the 18th *September*, but the horse was not sold on that day, in consequence of the defendant having forbidden the sale. The constable states that he put fresh notices, in form similar to the first, for the sale of the horse, which were torn down and destroyed, and then a third notice was given, which, it is supposed (for the day is not named) was fixed for the 23rd of *September*, when, if I rightly apprehend the evidence, the

horse was set up and sold at public auction to the father of the plaintiff for £6 10s. 0d., on the payment of which the purchaser received the delivery of the horse. The horse remained in the possession of the purchaser until the month of *January*, 1866, when he sent his son, the plaintiff, who resided with him, to *Guysborough* with the horse and a sled to purchase oats. While there the defendant forcibly took possession of the horse from the plaintiff and struck plaintiff several blows while he was attempting to prevent the defendant from leading away the horse.

These are the facts gathered from the report of the trial upon which the case was argued, and upon which the opinion of the Court has been formed.

I may here remark that the first point reserved at the trial was abandoned at the argument as untenable, under the circumstances of this case, but the second point was urged by the defendant's counsel upon the ground that the sale of the horse was made after the expiration of thirty days from the date of the warrant within which the constable was required to make his return upon it to the magistrate, and that therefore it was an illegal sale, and being an illegal sale the defendant had still the right of property in the horse, and was, therefore, justified in taking him out of the possession of the plaintiff.

It is abundantly clear from the evidence of *Edward, Worth*, the constable, that he was obstructed in various ways in effecting a sale of the horse, an obstruction arising very possibly from the strong feeling which then existed in that and other counties in this Province against the law under which the assessment was made; and, it may be presumed, that the defendant, largely influenced by that feeling, and not from any inability to pay, offered every opposition to the collection of the rate, and that may account for the sale not having been made before the expiration of the time mentioned in the warrant for its return.

The sole question in this case is, whether the constable, having seized the defendant's horse under the warrant produced before us, was justified in selling the horse thirty days, within which it was made returnable, had expired. The conclusion of the warrant is in these words, "and if no such

distress can be made, then that you certify the same to me, out of your doings under this warrant, make due return to me within thirty days after the date hereof." Now there is nothing in the act limiting the time within which the warrant is to be returned, that is left in the discretion of the magistrate, nor is it at all clear to my mind that the words used make it imperative on the constable to return the warrant within thirty days from the date of its issuing. The words referred to may be interpreted to mean that the constable is required to return his warrant and make a report of his proceedings thereon within thirty days from its date, in case no distress can be made, but that he shall not be required to make his return within that time in case he has levied on property which, without any fault of his, cannot be sold. That construction would cure many difficulties likely to arise in the execution of such warrants where property has been distrained, which cannot be sold; but assuming it to be the duty of a constable in ordinary cases to return the warrant within the time named therein, it appears to me that he has, or ought to have, the same power to sell property distrained by him under a warrant, that a Sheriff has under an execution. Now it is clear that a Sheriff may sell goods seized under an execution, after the return of the writ, and even after he is out of office, without a *venditione exponas*, 1 *B. & Ald.*, 230, 1 *Chitty's Arch.*, 607, (10th Ed.), and if a Sheriff may sell goods even after he is out of office, I think a constable who has seized property under a warrant, which he has endeavored to sell, but has been prevented from selling, as in this case, may sell it even after the return day of his warrant. I am of opinion, therefore, that the sale of the defendant's horse, seized under the warrant produced before the Court, was a legal sale, and that there is no ground for disturbing the verdict found by the jury upon which judgment may be entered for the plaintiff, with costs.

## ZWICKER v. ZINK.

THE Board of Trustees of Lunenburg Academy, by agreement among themselves ordered through plaintiff, a member of the Board, from a party in Boston, U. S., furniture for the Academy. The person from whom the furniture was procured forwarded it to plaintiff and drew on him for the amount. Plaintiff advanced \$196.42 to meet the draft, and delivered the furniture up on the assurance that the sum so advanced would be repaid to him. The amount required to liquidate the bill was assessed upon the section and collected to the extent of \$146, by defendant, a trustee, and Secretary of the Board, but applied by him to other uses.

*Held*, that defendant was liable for the sum of \$146, "it being money assessed and collected, and in his hands for the very purpose of liquidating this demand."

Also, that there being no plea in abatement, the objection taken at the argument to the non-joinder of the co-trustees could not avail.

WILKINS, J. dissented.

MCCULLY, J., now, (January 9th, 1871,) delivered the judgment of the Court:—

This was an action tried before His Lordship the Chief Justice, at *Lunenburg*, in *October*, 1869. The plaintiff, in the year 1867, together with defendant and one *Lockhart*, were Trustees of the *Lunenburg Academy*, which had then lately been erected, but required furniture. Defendant was Secretary to the Board of Trustees, as well as one of the Trustees. The furniture, by an agreement among the three Trustees, was ordered through plaintiff from a party in *Boston, U. S.*, who forwarded it to plaintiff and drew on him for the amount, \$350. Plaintiff advanced \$196.42 of the amount, and defendant borrowed the balance of a third party, giving his own obligation for repayment, and the furniture was paid for. It came to plaintiff and he gave it up, "on an assurance that it would be paid," as he testifies, that is that the amount so advanced would be refunded to him. Defendant continued to be Trustee and Secretary, up to the time of suit, though plaintiff had ceased before action brought, to retain office. The amount required to liquidate the bill for furniture had, previously to action brought, been assessed upon the School Section, and collected to the extent of \$146, and had been received by defendant, but he told plaintiff he had applied it to other uses. Plaintiff's testimony is, "I advanced the amount on defendant's account in particular." The amount, say \$550, *American currency*, required to pay for the furniture, was voted in *October*, 1866, and subsequently assessed in 1867, and collected, though some of it not till 1869.

The amount shown to have been assessed and collected, and in hand at one time to pay this claim was \$146, and for that sum, under the direction of His Lordship, who tried the cause, the jury found a verdict for plaintiff. A rule was granted by His Lordship to set the verdict aside, on several grounds, but which, on the argument, were reduced to one point—misdirection. *A. James*, defendant's Counsel, contended that this action would not lie against defendant, inasmuch as he was a public officer, and the transaction was with him in that capacity, and therefore, he had incurred no personal liability. For this several authorities are cited—4 *M. & P.*, 572; 1 *Ell. Bl. & E.*, 113; *Pro. Acts*, 1865, p. 86, sec. 34 and 35; 2 *Moo.*, 628; and 4 *Bro. & B.*, 275.

*J. W. Johnson*, for plaintiff, cited 1 *M. & P.*, 8; 3 *Bing.*, 478; *Amb.*, 770; 1 *Bro. C. C.*, 101; 3 *Ad. & E.*, 99; and 1 *Nev. & P.*, 26.

It was argued on the part of defendant's Counsel that the co-Trustees should have been joined, but as there was no plea in abatement, such an objection cannot now avail. As regards plaintiff's claim, the particulars endorsed upon the writ plainly indicated its nature, character, and extent. So that by no possibility could there have been any surprise to the defendant on the trial. *O'Brien v. Wetmore*, 1 *Allen's Rep.* (N. B.) 594, was an action against the Clerk of the House of Assembly of *New Brunswick*, and there it was held that "the Clerk of the Assembly, in the absence of an express contract, is personally liable to a person employed by him to cut wood, make fire and perform other menial services for the House of Assembly. Also that plaintiff was not bound by the amount allowed by the House for this service, as shown by the contingent account of the Assembly, put in evidence by the defendant, but, might recover more on a *quantum meruit*. *Gilbert v. Porter, et al.*, 2 *Kerr.*, 390. Plaintiff in this case advanced £300 on the following letter addressed to him by defendants, Aldermen of the City of *St. John* :

"Sir,—If you will be so good as to advance J. T. H. £300 for the purpose of paying the indigent laborers now employed by us, as a Committee of the Corporation, we pledge ourselves that the money shall be re-paid you next week."



which letter was signed by defendants, the word "Committee" being annexed to their signatures—under which was the following:—"Received the above sum of £300 from H. G. (plaintiff) for the Corporation, 8th February, 1842, J. T. H.—"*Held*, it was a proper question to be left to the jury, whether the loan was made on the personal responsibility of defendants, and if so, they are personally liable." Plaintiff, *Zwicker*, states in his evidence on the trial: "The furniture came to me, I gave it up on an assurance that it (meaning his demand) would be paid—I demanded the amount from the defendant out of money he had collected as Secretary, but which he told me he had applied to other uses." In *Pridly v. Rose*, 3 Merivale, 102, the Master of the Rolls, Sir William Grant lays down this proposition, "Where a public officer has in his hands money issued by the Government, for the use of an individual, it is clear that a suit may be maintained against the officer for the recovery of such money; for it is his duty towards the Crown, as well as towards the individual, to apply the money to its destined purpose." Assuming that defendant, as representing the Board of Trustees in this suit, which he does under the pleadings, not having pleaded in abatement—was entitled to all the protection of a Government public officer—which being a mere Trustee, annually chosen by and for a school district, is by no means admitted, yet supposing him entitled to all that the law concedes to the officers of the Crown (as in 4 *Bro. & Bing.*, 275), nevertheless by analogy this case falls clearly within the principle above laid down by the Master of the Rolls, and the defendant is liable for the sum of \$146, it being money assessed and collected, and in his hands for the very purpose of liquidating this demand. It was there "for the use of plaintiff,"—and in the language of the Master of the Rolls, and by parity of reasoning it was his (defendant's) duty towards the school section that contributed the amount, as towards the plaintiff to apply the money to the destined purpose. The rule *nisi* for a new trial must be discharged, with costs.

WILKINS, J.—This case does not appear to me to be governed by the principle of any of the cases relied on, or of any that have come to my notice. A fund adequate to reim-

burse the plaintiff was voted, assessed and came to the hands of the defendant, *qua* Secretary to the Trustees. Had he as such been uncontrolled as to the disposition of it, no doubt he would have been liable to the plaintiff. But it was not lawful for him to pay it over to the plaintiff without the direction of a majority of the Trustees. The Secretary's duties (and "disbursing such moneys" is specified as one of them. See section 42), are required by chapter 20, section 42 of the Acts of 1865, to be performed under the direction of a majority of the Trustees. Such direction in relation to this fund he is proved not to have had. In 1866 \$550 was voted for the furniture not then sent for. It appears to me, then, that the action does not lie against him as Secretary, neither can it, in my opinion, be maintained against him as a Trustee, even though he has not pleaded in abatement. Into his hands as a Trustee the fund never came. It rested in the hands of the legal recipient of it. Defendant, as one of the three Trustees, had no control over it, and the evidence shews that his two co-Trustees, *Lockhart* and *Dowling*, constituting "a majority of the Trustees," not only did not authorize payment to the plaintiff, but orally directed the defendant to appropriate the fund otherwise. Thus *qua cunque viâ datâ*, defendant appears to me not to be liable.

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### MURPHY v. DULHANTY ET AL.

PLAINTIFF was in the habit of hiring horses and wagons to persons requiring them. During his absence from home his wife, contrary to instructions not to hire horses or carriages in his absence, though the evidence on this point was of a doubtful character, hired to C., one of the defendants, a wagon and several horses to be used in conveying a gold crusher from Fort Hood to River Deania. While the team was crossing a bridge, driven by D., an experienced driver, who was joined as co-defendant, and against whom alone the action was prosecuted, one of the horses received injuries, by getting a leg through the bridge, in consequence of which he died. The plaintiff's writ contained counts in trespass and trover, but the action was treated throughout as one of trover. A verdict having been found for plaintiff,

*Held*, that there was no evidence of conversion by the defendant D, and that he, being merely the servant of C, ought not to be held responsible for an injury which was admitted to have been an inevitable accident.

DESBARRES, J., now (January 23rd, 1871.) delivered the judgment of the Court:—

This was an action against the defendant and another person named *Patrick Caddigan*, but it was prosecuted

against the defendant only, in consequence of *Caddigan* not having been served with a copy of the writ. There are two counts in the plaintiff's writ or declaration. The first in trespass for taking and carrying away and converting to their own use, two horses and two sets of harness, &c., and the second in trover for converting to their own use a horse of the plaintiff. The defendant, *Dulhanty*, by his plea to the first count of plaintiff's declaration, denies the taking and carrying away and converting to his own use, the goods and chattles of the plaintiff, and by his plea to the second count denies the conversion. At the trial the case was treated by both parties, as well as by the learned Judge who tried it, whose attention was not called to the writ, as an action of trover, and not as a mixed action of trespass and trover. There was a verdict for the plaintiff and a rule was granted to set it aside upon the following grounds: First, its being against law and evidence. Second, for improper reception of evidence, and lastly as being against the charge of the learned Judge.

It appears from the Judge's report that the plaintiff had kept a livery stable at *Port Hood*, and was in the habit of hiring horses and waggons to such persons as required them, and *Caddigan*, having a gold crusher at *Port Hood* which he desired to convey from thence to *River Dennis*, called on the defendant to know where he could procure a team for that purpose, who advised him to apply to the plaintiff, and being a stranger at *Port Hood*, *Caddigan* requested the defendant to accompany him to the plaintiff's residence, which he did. Finding the plaintiff was not at home, *Caddigan* applied to plaintiff's wife to let him have a team of horses and a waggon to transport his crusher to the place named, and *Mrs. Murphy* agreed to provide a team of three horses and a waggon for that purpose. *Caddigan* then paid *Mrs. Murphy* \$10 for the hire of the team and waggon, in the presence of defendant, who, at the time, intimated to her that he had nothing to do with the matter. *Mrs. Murphy* sent her son *Andrew*, a boy 14 years of age, with the horses, &c, to *Caddigan*, at the wharf, who, after the crusher was placed in the waggon, requested the defendant to drive the team, which, with *Caddigan's* own horse, consisted of four horses. The defendant consented to drive the team, being accompanied by

plaintiff's son *Andrew*, who, though not able to drive, was sent by his mother to take care of the horses. After proceeding about six miles on the road to *River Dennis*, while attempting to pass a cart, the crusher fell out of the waggon, and the defendant as well as the boy were obliged to return to *Port Hood* with the team. On his return the defendant saw *Mrs. Murphy*, who told him she would have the boy up early in the morning for a fresh start. The defendant, accompanied as before by the boy and *Caddigan*, started on the following morning with the team, and having again put the crusher in the waggon, proceeded on their way a short distance, and in crossing over a bridge one of the plaintiff's horses got his hind leg through the bridge and fell, the waggon going against him and keeping him down. On extricating the horse it was found his leg was broken, and having died in consequence of the injuries thus received, the present action was brought in order to recover the value of the animal from the defendant, upon the ground insisted upon by the plaintiff that his wife, though she received \$10 for the hire of the horses from *Caddigan*, had no authority to hire them, and that, therefore, the use of the horses by *Caddigan*, and the driving of them by defendant, at his request, rendered both of them trespassers in law. The defendant having been a mail-driver for years, was accustomed to drive, and was driving at a slow and moderate pace at the time the horse received the injury. It is not pretended even by the plaintiff himself, that the injury to the horse occurred through any carelessness or negligence on the part of the defendant. Of that the plaintiff's son, who was present at the time, completely exonerates him; nor is it pretended that the defendant had any interest whatever in the conveyance of the crusher, or that he had any part in the hiring of the horses. He was merely the servant of *Caddigan* and ought not, therefore, to be held responsible for an injury which occurred without his fault and which is admitted to have been an inevitable accident, unless indeed the law is too clear to admit of any excuse.

I do not think the plaintiff can recover, against the defendant, under the second count of his declaration, for there has been no conversion of the plaintiff's horse by the defendant; but the question for our consideration is, whether the

defendant, under the circumstances of this case, is liable, under the first count as a trespasser, for taking away the plaintiff's horse without his leave and converting him to his own use. The only evidence in support of the count in trespass is that which was given by the plaintiff himself, who states that he always directed his wife not to hire horses or carriages in his absence, and that being absent at the time, his wife had no authority to hire them.

In his cross-examination he says: "When I go away I leave my house in charge of my wife. She has nothing to do outside the house. I leave the outside of the house in charge of my boys and servants, but they had no authority to hire my horses. I sometimes sent my son *Andrew* in charge of my horses with passengers in a light waggon."

It is difficult to reconcile the evidence of the plaintiff with the conduct of the wife and the son, and the only inference to be drawn therefrom is that the plaintiff either did not give to the wife and the son the instruction of which he speaks, or if he did, that both the wife and the son grossly violated his instruction; the wife by hiring the horses to *Caddigan* for \$10, which she received for such hiring without ever intimating to him that she had no authority to hire; and the son by taking the horses to *Caddigan* to be used for the purpose for which he required them, without intimating that his father had imposed upon him the restriction to which the father has testified. The son and agent of the father was not only silent as to his being precluded by his father's instructions from hiring the horses in his absence, but he accompanied the horses to take care of them, thereby leading *Caddigan* to suppose that both his mother and himself had full authority to hire, and receive pay for the hire of the horses in the absence of the plaintiff. I may here remark that the plaintiff does not say that on leaving home for *Halifax*, on the particular occasion, he positively directed his wife not to hire his horses, his words are, "In my absence I always direct my wife not to hire horses or carriages." That any man having horses to hire should direct his wife not to hire them in his absence, and thereby allow his business to be suspended until his return, is certainly a very unusual mode of conducting the business in which he was engaged, and it is hardly to be

supposed that the wife on the one hand and the son on the other, if such instructions had actually been given, would have ventured to disregard them.

It is worthy of observation too that *Andrew*, the son, in giving his evidence in this case, does not say, as he doubtless would have said if he had been aware of the fact, that any such instructions were ever given out, as he and his brothers were left in charge, according to his fathers statement, of every thing outside of the house, including, of course, the horses; it does seem strange that these instructions in reference to the very property over which he had the control were not communicated to him. The plaintiff's wife, who could have spoken on the subject, was not called as a witness, and therefore the evidence on that point rests altogether in the uncorroborated statement of the plaintiff himself, which, for the reasons I have mentioned, leaves some ground for the belief that it may not be strictly accurate.

I must say that the strong impression made in my mind on reading the whole of the evidence, is that the verdict ought to have been for the defendant, and seeing that the case was treated throughout as an action of trover, in which form it cannot be sustained, there being, as I have already said, no evidence of any conversion by the defendant. I think the case ought to be sent to another jury, and the verdict must, for that purpose, be set aside.

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### FISHER v. ARCHIBALD ET AL.

THE defendants A., at an auction of hay, bid off the unsold portion, estimated at 25 tons, at \$12 per ton, and gave to plaintiff his note for \$300, on the understanding that if the quantity sold fell short of the estimated amount, a proportionate deduction would be made from the face of the note. The quantity having been largely overestimated.

*Held*, that it was competent for the Court to receive evidence of the circumstances under which the note was given to show a partial failure of consideration.

WILKINS, J., now, (January 6th. 1871,) delivered the judgment of the Court:

In this case of conflicting testimony we must, having regard to the verdict, adopt that which was given on the part of the defendants:—It establishes these facts viz., that

the defendant *Archibald*, (*Nelson* appearing before us merely as his surety, and a co-drawer of the note in question), at an auction of hay made by the plaintiff, bid off the unsold portion of the hay that was the subject of the sale. The quantity was then uncertain, but *Archibald*, at the instance of the plaintiff, signed (with his surety) a promissory note to plaintiff for \$300, which represented, estimated at the price agreed on (\$12 per ton) the quantity of hay supposed to be by the defendant *Archibald* purchased, with a distinct understanding, however, between the principal parties that the plaintiff would deduct from the face of the note whatever the amount should prove to be in respect of which the hay actually received by *Archibald* fell short of the estimated quantity. *Archibald*, at the trial swore, and the jury accredited his assertion, that, instead of receiving 25 tons—the estimated quantity—he received only 9 tons and 16 cwt. The plaintiff sued the defendants for the full amount of the note. They among other pleas, pleaded that very state of circumstance by way of defence which was proved by *Archibald* and found to be true by the jury. The defendants having paid into court \$153.36, asserting it to be enough to satisfy plaintiff's claim, an assertion controverted by him in a replication. The plaintiff obtained a rule to set aside the verdict, on the ground of improper reception of evidence, and that the verdict was against law and evidence. The only question raised at the argument was whether in answer to the plaintiff's action on the note, it was competent for the Court to receive evidence of the circumstances under which the note was given to shew a partial failure of consideration of the note.

We are clearly of opinion, that as between the original parties to the note, that question must be answered in the affirmative. The rule of law which governs it is thus concisely stated in a work of authority, *Brooms' Legal Maxims*, p. 724, he says: "As regards bills of exchange and promissory notes, the rule is, that either of these instruments is presumed to be made upon, and *prima facie* imports, consideration, and the words 'value received,' express only what the law will imply from the nature of the instrument, and the relations of the parties apparent on it; and then the maxim '*expressio*

*eorum quæ tacite insunt nihil operatur,* is applicable. In an action on a bill or note between the immediate parties thereto, the consideration may be inquired into; and if it be proved that the plaintiff gave, and the defendant received no value, the action will fail." As authority for this the learned author cites *Southall v. Rigg*, and *Norman v. Wright*, 11 C. B., 481, 492; *Crofts v. Beale*, 11 C. B., 172; *Kearns v. Durell*, 6 C. B., 596. They fully sustain his position, and shew further that the rule extends to authorize an inquiry into a partial failure of consideration as between the original parties to the instrument. *Cresswell, J.*, (as noticed by *Broom* in the passage referred to), says in the case in 11 C. B., "Where there is a promise to pay a certain sum, all being supposed to be due, each part of the money expressed to be due is the consideration for each part of the promise; and the consideration as to any part failing, the promise is *pro tanto nudum pactum*." We are, therefore, of opinion that this rule must be discharged.

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#### IN RE E. D. TUCKER, AN INSOLVENT.

T., an insolvent, made a voluntary assignment which he delivered to the interim assignee on the 1st March, who called a meeting of creditors for the 15th March, at which he was appointed assignee of the estate. On the 29th March the insolvent filed with the assignee a deed of composition and discharge, and an advertisement was thereupon published and continued for one month, giving notice of application for confirmation of the discharge. The application was made on May 18th, and the discharge refused on the grounds, 1st, that the insolvent had not deposited the deed with the assignee for the purpose contemplated, nor had the assignee pursued the course prescribed by section 97, Dominion Insolvent Act of 1869. 2nd. That one month's notice had not expired from the first meeting of creditors of insolvent before the filing of and acting upon the deed of composition and discharge as required by section 36. 3rd. That no dividend could be declared until three months after notice of the appointment of the assignee.

*Held*, 1st, that the insolvent if he saw fit might waive section 97 and proceed under section 101. 2nd, that if the deed, when filed, had been executed by a majority of the creditors under section 94, there was no reason for delay, as the confirmation itself could not take place before the month had expired. 3rd, that it was not the meaning of section 55 that no dividend could be declared until after the expiry of three months from the appointment of an assignee, but that a dividend might be declared at the end of one month if the assignee had funds.

*Held*, also that the objections taken merely being of a preliminary character, the insolvent was not entitled to his discharge on failure of the objections, without further enquiry.

SIR WILLIAM YOUNG, C. J., now, (June 2nd, 1871), delivered judgment as follows :—

This is an appeal to me under the *Dominion Insolvent Act* of 1869, section 83, from an order of the Judge of Probate and Insolvency at *Halifax*, made on the 18th March last. It



was a final order or judgment refusing a discharge to the insolvent under a deed of composition on preliminary or technical objections arising out of the Act, and without any examination of the insolvent, or enquiry into the validity of the deed. I had supposed, when I granted a rule *nisi* on the appeal, that these were the only objections; but it appeared on the hearing before me on the 28th *ultimo*, that other objections alleged to be of a more serious kind were behind, with which, at present, I have nothing to do. An objection also was taken to the regularity of the appeal under section 84, which, I think, is untenable.

The insolvent made a voluntary assignment, dated 28th *February*, and delivered it to the interim assignee 1st *March*, who forthwith called a meeting of the creditors, under section 2, for the 15th. The creditors who had proved their claims under section 122, thereupon appointed the interim assignee to be the assignee of the estate. On the 24th *March* a deed of composition and discharge was prepared by the insolvent, which was filed with the assignee on the 29th, and the insolvent thereupon published an advertisement of that day, and continued it for one month, that on the 1st of *May* he would apply to the Insolvency Court for a confirmation of his discharge. The order of the 18th *May*—the subject of this appeal—was the result of that application.

The first objection was, that the insolvent had not deposited the deed with the assignee for the purpose contemplated; nor had the assignee pursued the course prescribed by section 97. —This section is analogous to the 2nd sub-section of section 9 of the parent Act of 1864, and the question is, whether it is imperative or optional. If acted on and no opposition to the composition and discharge is made by a creditor, it saves time and is a great advantage to the insolvent—But where he has reason to apprehend (as was the case here) that opposition would be made, there was neither saving of time nor advantage to either party, and upon the best consideration I can give to this case, I am of opinion that the insolvent may waive it in all cases if he thinks fit, and proceed under section 101.

The second objection was that one month's notice had not expired from the first meeting of creditors of the insolvent before the deed of composition and discharge had been filed

in court and acted upon as required by section 36 of said Act. By section 36 the assignee, immediately upon his appointment, shall give notice thereof by an advertisement in form which requires creditors to file their claims before the assignee within one month—that is, in this case, by the 15th or 16th of *April*,—creditors having this time by the statute to come in, was it legal to file a deed of composition and discharge and publish an advertisement on it (which is the action referred to in the objection) on the 29th *March*. There is more in this objection than in the former, and yet if the deed in point of fact, when filed, has been executed by a majority of the creditors under section 94 (which is the main inquiry), there is no reason for delay, as the confirmation itself cannot take place before the month has expired. There seems to have been no decision on this point in Canada, and the commentators there differ upon it, as will be seen upon reference to *Mr. Abbott's* edition of the Act of 1864, folio 67, and the doubt in *Mr. Popham's* edition of the Act of 1869, folio 124. The hearing before the Judge in this case was on the 18th *May*, more than two months after the advertisement to the creditors, when the objection in point of time was reduced to a mere technicality, which, as I think, ought not to prevail.

The third objection proceeded, as I conceive, on a misapprehension of the Act. It was assumed that no dividend could have been declared on the 1st of *May*, nor until three months had expired after notice of the appointment of an assignee. That is not the meaning of section 55—The assignee may declare a dividend if he have funds, at the end of one month, or as soon as may be after the expiration of such period, and thereafter at intervals of not more than three months. I over-rule, therefore, this objection—and regret that the hearing below was confined to these niceties of construction in place of the main issue. The Counsel for the insolvent insisted that these were now excluded, and the opposing creditors having failed on these preliminary points that the insolvent was entitled to a discharge without further enquiry. But I cannot assent to this view which would be against the analogy and the practice of all Courts, and content myself with disposing of the point before me and setting aside the judgment of 18th *May* and the order of 22nd *May* thereon with costs.

IN RE THOS. ARCHIBALD & JOHN ARCHIBALD,  
INSOLVENTS.

T. A. and J. A. made application for a discharge in insolvency under the Dominion Insolvent Act of 1869. The principal objection taken to the discharge was that the Act applied to traders only, whereas the insolvents admitted that at the time of its passage they had ceased to be traders. Before judgment the Act of 1871 was passed, amending the Act of 1869 so as to include parties who, having been traders at the time of the passage of the latter Act, had since ceased to trade.

*Held*, that the insolvents came within the latter Act and were entitled to their discharge, but without costs, they having succeeded on a ground that had no existence when they entered their appeal.

SIR WM. YOUNG, C. J., now, (June 2nd, 1871,) delivered the judgment of the Court :—

This is an appeal from an order of the Judge of Probate and of Insolvency, at Halifax, dated 1st *March* last, discharging the insolvents under section 105 of the *Act of 1869*. Their petition set out their assignment of 1st *December*, 1869 and that more than one year having elapsed from the date thereof, and the petitioners having failed in obtaining from the required proportion of their creditors a consent to their discharge, they applied to the Judge to grant such discharge pursuant to the statute. The insolvents were thereupon subjected to personal examination before the Judge respecting their dealings, books and liabilities, which extended over three days, and, after careful examination, the counsel who appeared for the creditors and against the insolvents expressed themselves satisfied with the explanations afforded by the insolvents and acquitted them of fraud in their dealings. Some delay then took place with a view to the legal objection being raised which was urged on the appeal but had not been brought before the Judge of Probate who granted the order of discharge as unopposed. The first hearing on the appeal was had before me at Chambers on the 31st *March*, when some preliminary objections were taken on the part of the insolvents, which were afterwards withdrawn; and the main question came up on an admission of the insolvents that, at the time the Act passed in 1869, they had ceased to be traders. The case of *Surtees v. Ellison*, 9 B. & C., 750, (decided in 1829), was then cited, and I looked into the point and was prepared to give judgment, but withheld it at the instance of

the counsel who were negotiating for a settlement. In the mean while the Dominion Parliament passed on the 14th April, the *Amending Act of 1871*, chapter 5, which the insolvents insisted on at a second hearing on the 26th instant, and I am now to consider the effect of both Acts.

The policy of the Imperial and Colonial Legislatures has varied from time to time as to the persons to whom the privileges and obligations of the bankrupt laws should extend. The 34 & 35 *Henry VII.*, passed in 1542, was aimed at all persons who, in the quaint language of the preamble, "*craftily obtaining into their hands great substance of other men's goods do suddenly flee to parts unknown, or keep their houses not minding to pay or restore to any of their creditors their debts or dues, but, at their own wills and pleasure, consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience,*" a description which might be applied to a good many bankrupts of the present day. The 13 *Eliz.*, chapter 7, and the 21 *Jac. I.*, chapter 19, comprehend all persons using or exercising the trade of merchandize and some other trades and professions. By the 6 *Geo. IV.*, ch. 16, all persons using certain trades and doing certain acts, and all persons using the trade of merchandize, shall be deemed traders. And the present bankrupt laws in *England*,—the 31 & 32 *Vic.*, ch. 71, passed in 1869, extend to non-traders as well as traders, a full description of traders being given in the schedule—while a recent decision has extended it to peers of the realm.

The *Canadian Insolvent Act of 1864*, the parent of the present one, applied in *Lower Canada* to traders only, and in *Upper Canada* to all persons, whether traders or non-traders. The *Dominion Act of 1869* applied to traders only, and this the *Amending Act of 1871* has somewhat modified it.

Under the *Act of 1869*, I should have held, on the authority of *Surtees v. Ellison*, that a person who had ceased to be a trader at the passing of the act did not come within it. The trading in that case was before the passing of the 6 *Geo. IV.*, ch. 19, and the Court were all of opinion that they must look at the statute as if it were the first that had ever passed on the subject of bankruptcy and that there was no sufficient

trading to support the commission. Lord *Tenterden*, in stating this result, lamented that a statute of so much importance should have been framed with so little attention to some of its provisions. The legislature, he added, cannot be said to be *inops consilii*; but we may say that it is "*magnas inter opes inops*."

The reasoning of this case has a direct bearing on the Act of 1869, and, in my opinion, confined its operation to persons who had been, and continued to be, traders at the time it passed. We may infer that such was the opinion also of the Dominion Parliament, and that it led, among other things, to the Act of 1871 amending the Act of 1869, the first section of the former Act being as follows: "The first section of the said Act, (that of 1869,) is hereby amended by adding thereto the following words: All persons shall be held to be traders who, having been traders and having incurred debts as such, which have not been barred by the statutes of limitations, as prescribed, have since ceased to trade; but no proceedings in compulsory liquidation shall be taken against any person, based upon any debt or debts contracted after he had so ceased to trade."

This is a very comprehensive and a very important provision, peculiar so far as I know to our law, and the true construction of which it is of great moment to ascertain. The section I have first cited is not declaratory in its form; it is professedly, as it is in fact, an amendment, but an amendment incorporated with the original section and thenceforth forming an essential part of it. Even in statutes, distinct from each other, but on the same subject, the several acts are to be taken together as forming one system and as helping to interpret and enforce each other, being *in pari materia*, that are to be read as one statute. The doctrine as to the retrospective operation of statutes was fully considered by this Court in the case of *Simpson's Estate*, 1 Oldright, 317, and had been previously reviewed in the case of *Wright v. Hale*, in the Exchequer, 6 Hurlestone & Norman, 227. He held, "that however it may be in the *United States*, where the constitution expressly condemns and forbids retrospective laws which impair the obligation of contracts, or

partake of the character of *ex post facto* laws, there can be no doubt that the Imperial Parliament and Colonial Legislature within the limits of their jurisdiction have a more extended authority; and where their intention is to make a law retrospective, it cannot be disputed that they have the power. That intention is to be made manifest by express words, or to be gathered, clearly and unmistakeably, from the purview and scope of the act. It is a question of construction, and the act being its own chief exponent, still the surrounding circumstances are to be looked upon.

Applying these principles to the Act of 1871, there can be no question, I think, that it was intended to govern the operation and to enlarge the scope of the Act of 1869, and that all future proceedings in cases of bankruptcy, and the traders to whom it shall apply, must be regulated by it. The reference to the Statute of Limitations is not strictly within the scope of our present inquiry, but in a matter coming before all the Courts of Probate in our Province, and which will be eagerly discussed, it is not amiss, I think, that I should add, that where the debts of a person who had been a trader before but had ceased to be so on the 22nd June, 1869, have been barred by the Statutes of Limitations or prescribed (that is, where they are no longer enforceable at law,) such person is not entitled to the benefit of the act.

Under the facts in this case I am of opinion that the insolvents come within the act, if it applies to proceedings actually commenced in our Courts of Probate or under appeal in this Court. This is the only question that remains, and several cases in *Fisher's Digest*, 8231, were cited by *Mr. McDonald* as bearing on it on behalf of the insolvents. In *Wright v. Hale* it was held that the 23 & 24 Vic., ch. 126, enabled a judge to certify in an action commenced before the passing of the act. "There is a considerable difference," said *Pollock, C. B.*, "between new enactments which affect vested rights and those which merely affect the procedure in courts of justice. Where an act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions. See the *Imperial Acts*, 24 &

25 Vic., ch. 62, sec. 5. The same principle is recognized in *Freeman v. Moyes*, 1 Ad. & El. 338, and in the Admiralty case of the *Ironsides*, reported in 1 Lush, 465.

I have already held that the first section of the Act of 1871 must operate as a retrospective enactment, and I see no reason why it should not apply to a pending suit or appeal. To hold otherwise would only oblige the insolvents to commence *de novo*. The case of *Cornill v. Hudson*, 8 Ell. & Bl., 429, where it was held that the 10th section of the *Mercantile Law Amendment Act* did not extend to actions already commenced, and our own decision of the like purport in *Coulson v. Sangster*, 1 Oldright, 677, proceeded mainly on the language of the enactment, and, as I think, do not apply here. I confirm, therefore, the discharge of the insolvents, but as they have succeeded on a ground which had no existence when they entered their appeal, I must decline giving them costs.



**DECISIONS**  
**OF THE**  
**SUPREME COURT OF NOVA SCOTIA,**  
**JULY TERM, 1871.**

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**IN RE THE BANK OF YARMOUTH.**

By chapter 46, R. S., (3rd series,) "Of county assessments," section 15, it was enacted that the words "personal estate" and "personal property," for the purposes of the Act, shall be understood to include "all such goods, chattels and other property," as were enumerated in schedule A, thereto annexed, "and no other." The only portion of schedule A applicable was as follows:—"All personal chattels of every kind and description at their actual cash value."

The Bank of Yarmouth having been assessed under the above enactment, as personal estate, for \$20,000, the average amount of cash on hand, and for \$100,000, cash lent out,

*Held*, that the Bank was liable to be assessed for the average amount of stock on hand, and the value of personal property exclusive of stock, but not for the amount of cash lent out.

The phrase "personal chattels" means "only such things as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion, and transferred from place to place, but" does not include choses in action, notes of hand, bonds, and securities for money loaned or due, which may be realized upon by action or suit or otherwise.

McCULLY, J., now, (July, 1871), delivered the judgment of the Court:—

This case was argued before the full Court in *Michaelmas Term, 1870*. The Bank, on the 27th day of *November, 1867*, had been assessed in the sum of six hundred and seventy dollars and seven cents, made up as follows:

Township rates.....	\$ 220 50
Poor rates.....	132 03
Engine rates.....	32 50
Police rates.....	5 04
School rates.....	280 00
In all.....	<u>\$670 07</u>



Besides one hundred and thirty-four days performance of highway labour, the money value of which does not appear. From this assessment the Bank appealed to a Court of Special Sessions, and upon a hearing had, the Court of Special Sessions confirmed the assessment. Thereupon the Bank sued out a writ of *Certiorari*, and the proceedings were removed to this Court, and a motion made to reverse the decision of the Court of Sessions and quash the assessment so far as it refers to the Bank. Counsel were heard for and against the motion.

The facts of the case, so far as necessary for the present purpose, are not in controversy, and are as follows:—The paid up capital of the Bank is \$120,000. The average amount of cash on hand, \$20,000, the balance, \$100,000, being lent out. The Real Estate of the Bank for the purpose of this assessment was valued at \$6,000, and the personal at \$120,000, total, \$126,000. The value of the personal property, exclusive of the stock, is sworn at \$600.

The grounds taken on behalf of the Bank are that the Bank is liable to be assessed upon the Real Estate and local visible property only, not upon its money and paid up capital or stock, nor upon funds lent out and not in possession. That the Bank is not liable to be assessed for money in its vaults because, under the term personal chattels in Schedule A., chapter 45, *Revised Statutes*, money is not mentioned to be included. That the \$120,000 paid up capital is never in the Bank at any one time, and being lent, becomes the property of the borrower, and as such is not under the control of the lender.

The point to be decided in this case is, what is the true legal construction and meaning under chapter 45, above cited, of the words: "personal Estate and personal property, where, by the statute, it is enacted that they are to be understood to include all such goods, chattels and other property as are enumerated in Schedule A., thereto annexed, and no other." Schedule A. is as follows:—"All personal chattels of every kind and description at their actual cash value, except as qualified beneath." The remainder of the section applies to goods of merchants and ships, and has no bearing upon this case. What then are "personal chattels"? *Com. Dig., title*

"Biens," personal chattels are cattle, household stuff, citing *Co. Lit.*, 118 b., Lord Coke there says: "chattels is a French word signifying goods which, by a word of art, we call *catalla*. Now goods or chattels are either personal or real. Personal as horses or other beasts, household stuff, weapons, and such like, called personal because for the most part they belong to the person of a man, or else that they are to be recovered by personal actions.

*Tomlins* in his *Law Dictionary Title Chattels* says: Chattels are either real or personal, personal as gold, silver-plate, jewels, household stuffs, goods and wares in a shop, corn sown in the ground, carts, ploughs, coaches, saddles, cattle, &c., or as horses, oxen, kine, bullocks, sheep, hogs, and all tame fowls and birds, swans, turkeys, geese, poultry, &c., and these are called personal in two respects, one because they belong immediately to the person of a man, and the other for that being any way injuriously withheld from us we have no means to recover them, but by personal action. \* \* \*

But deeds relating to freehold obligations, or which are things in action, are not reckoned under goods and chattels, though writings may be chattels. Money hath been accounted not to be goods or chattels, nor are hawks or hounds, such being *feræ naturæ*, citing 8 Reports, 33, *Terms de Ley*, 103. *Stephens*, in his *Commentaries, Lib. Ed.*, vol. 2, folio 10, says: "Property in chattels, personal, may be in possession or in action. In possession, as where a man has the enjoyment, actual or constructive, &c. In action, where the party has merely a right to recover it by a suit or action at law from whence the thing so recoverable is called a chose in action. Thus, money due on a bond is a chose in action for a property in the money vests, whenever it becomes payable, but there is no possession till recovered by course of law, &c., so if a man promise or covenant with me to do any act, and fails, whereby I suffer damage, the recompense for the damage is a chose in action. It is a thing *in posse*, rather than *in esse*. Among these are included Patents and Copyrights, &c. incorporeal chattels." *Williams on Executors*, vol. 1, p. 624., citing *Blackstone's Com.*, 387-8, says: Chattels personal are property, and strictly speaking, things moveable, which may be annexed to or attendant on the person of the owner, and

carried about with him from one part of the world to another, such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from place to place, and this I take to be the more modern and the sound, legal construction of the phrase "personal chattels." Section 347 of chapter 81 of the Acts of 1864, which is the present Charter of Incorporation of the City of *Halifax*, defines what "Personal Estate" for the purpose of assessment under that Act, shall be held to mean, and mentions specifically as taxable under that phrase within the city, "stocks in public or private banking companies, &c.," with other language comprehensive enough and sufficiently large to have sustained the assessment, were this the case of a bank located within the city.

The subject of the liability of banks and other incorporated companies to taxation may be found and very fully discussed and the latest decisions enunciated, in the 9th and last edition of *Angell & Ames on Corporations*, sections 438 and onwards. But except to reiterate the principle laid down by Lord *Kenyon* in *Rex v. Churchwardens and Overseers, &c.* 1 East, 534, that there can be no double taxation, that the capital stock of a corporation, and the stock-holders, on account of their separate ownership of it, cannot both be taxed at the same time; there is not much to be gathered from American decisions to aid us, as they are mostly, if not all based upon statutable legislation, see section 461.

Referring to the subject of statute labour and so much of the assessment as applies to road taxes, at section 441 it has been held in *New York* in the *Bank of Ithica v. King*, 12, *Wend.*, 390, that "moneyed corporations are not liable to be assessed to work on the public highways, they not being within the purview of the Act prescribing such assessment," that, "where an Act of the Legislature directs a thing to be done which it is impossible for a corporation to do, but which natural persons may do, the corporation is of course excused," and to establish this proposition the case of *Cortis v. Kent Waterworks Company*, 7 B. & C., 314 is cited. The language of our Statute, chapter 62, *Revised Statutes*, section 2, is as follows:—"Every male between the ages of 16 and 60, being able to do a reasonable day's work shall be

liable to perform two days labour as a poll-tax." Section 3, "All males whose names are included in the assessment roll and assessed for any sum over \$200 (by Acts 1865, ch. 1, sec. 4, reduced to \$100) shall be liable to perform in addition according to the following scale;" then follows a scale graded to meet the exigencies of the case, and the circumstances of the population. Section 4 provides for the case of males over 60 years holding property over \$1,000, and section 6 of this chapter 62 regulates and makes liable property "in the hands of executors, administrators, trustees, agents, guardians, and women, where property is over \$1,000 in value, for taxes to make and repair highways." Corporations, it is true, are not named in section 6 of the Act, but the intent of the Legislature so clearly expressed to tax not persons only, but property, and that in the hands of trustees, agents, and others in fiduciary relations, brings a corporation like the Bank of *Yarmouth* clearly within its purview and within the scope of the decision. The authorities cited on the argument shed but little light upon the subject. The decisions to be found in the English books of authority are based upon the Statute of 43 *Eliz.*, chapter 2, (and in view of Provincial Legislation applicable to Provincial requirements) not in force here. The appellants cited the *King v. White et al.*, decided under the statute of *Eliz.*, and relied largely upon the ruling that money as such was not rateable under that statute. Lord *Kenyon*, C. J., dissented, but expressed his gratification that his learned bretheren had been able to arrive at a different conclusion from his own. He then referred with approval to an expression of *Yates, J.*, in 1769, "the officer making the rate must be able to support what he has done by evidence, and no personal property can be rated but the clear liquidated surplus after paying all debts." A number of decisions under this statute are to be found under the word "Poor," collected in the late editions of *Burns' Justice*. But the peculiar wording of our own statute, first affirmatively and then negatively, declaring upon what the assessment shall be levied, and upon nothing else, reduces the enquiry, as already remarked, to the single point, the meaning of the phrase "personal chattles."

It may seem strange, and undesirable it certainly is, that a different rule should apply to banks within the limits of the

city, from that applicable to banks without the city ; but the Legislature having introduced language into its Acts in the two cases so widely different, all that a Court can legitimately do is to apply those well-defined and understood principles for the construction of statutes which obtain so universally in English courts, a collection and summary of these may be found, with comments and authorities, cited in the very excellent work, *Brooms Legal Maxims*, 6 Am. Ed., p. 420. In conclusion, the author remarks: "It may then safely be stated as an established rule of construction, that an Act of Parliament should be read according to the ordinary and grammatical sense of the words, unless being so read it would be absurd or inconsistent with the declared intentions of the Legislature, to be collected from the rest of the Act," &c., &c., with the light obtained by a careful consideration of the decisions thus collected and collated, and a recently decided case to be found in *Fisher's Dig.*, vol. 1, p. 1546, to the effect that "Mortgage deeds which are subsisting securities for money, and therefore choses in action," are not properly described in an indictment as goods or chattels. In a very recent case, *Re Jackson, ex parte, the Union Bank of Manchester (Limited)*, decided May, 1872, scrip of shares in a Joint Stock Company was held by Bacon, C. J., in bankruptcy, not to be choses in action. But his reasons were that the title is dependent on the register. It can be bequeathed or given, it exists, it is not in action. Such property is as much property as a freehold estate, and is not in any degree a chose in action.

After giving the case my best consideration, the conclusion at which I have arrived is, that the words "personal chattels" must be construed to mean, as set forth in *Williams on Executors*, 624, already cited, "only such things as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion, and transferred from place to place." But that the phrase does not include "choses in action, notes of hand, bonds and securities for money loaned or due, which may be realized upon by action or suit or otherwise."

The personal chattels of the Bank then liable to assessment, (exclusive of real estate), are \$20,000, being the average

amount of specie on hand, and \$600 of other personal estate, with \$6,000 worth of real estate, making in all \$26,000 of rateable property, upon this sum and this only was the Bank rateable, the assessment must therefore be amended accordingly, and the overplus paid be refunded to the appellants. As the assessment appealed from is not sustained and the appellants have failed as to so much of their appeal as applies to the money on hand, and this is a question arising out of the construction of a Provincial Statute, without precedent to guide the rule embodying the decision should, I think, be granted without costs either way.

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## EATON ET AL. v. CAMPBELL.

J. T. and J. M., arbitrators, being agreed that a certain sum was due by the defendant, but differing as to the parties by whom the action could be legally brought, by a memorandum endorsed upon the submission, appointed J. W. R. as umpire. The latter having heard from the arbitrators the statement of facts, in which they both concurred, decided that the plaintiffs were the proper parties, and so awarded in conjunction with the arbitrator with whom he agreed.

The defendant took exception to the award on the grounds, 1st, that he had not acquiesced in the appointment of the umpire; 2nd, that the umpire had not himself heard the evidence of the parties; and 3rd, that the defendant had no notice of the appointment or opportunity of producing testimony.

After argument the case was referred back to the umpire with instructions to cite the parties before him to enable them to be heard with their witnesses.

SIR W. YOUNG, C. J., while consenting to the cause being referred back, was of opinion that the award was sustainable, and that the rule for setting it aside should be discharged.

SIR W. YOUNG, C. J., now, (July 27th., 1871), delivered the judgment of the Court:—

This case was referred by the parties to *James Thompson* and *James McDonald*, Esquires, "so as the said arbitrators, or in case it shall become necessary to appoint an umpire, such umpire shall make and publish their or his award, in writing, on or before a day named." The two arbitrators met, and having heard evidence, including that of the defendant, they agreed that the sum of \$100 was due by the defendant. But they differed as to the parties by whom the action could be legally brought, whether by the partners of the firm as it existed when the amount was collected by the defendant, or by the partners of the new firm. This matter

they referred to the Hon. *J. W. Ritchie*, as umpire, by a memorandum indorsed on the submission, and *Mr. Ritchie*, having heard the statement of facts from the arbitrators, in which both the arbitrators concurred, decided that the present plaintiffs were the proper parties to bring the suit, and awarded accordingly in conjunction with the arbitrator with whom he concurred. A rule *nisi* was granted to set aside this award, and was heard at the last term on affidavits on the grounds that the defendant had not acquiesced in the appointment of the umpire, that the umpire had not himself heard the evidence or the parties, and that the defendant had had no notice of his appointment, and no opportunity of producing testimony before him. On the old cases and the rule as laid down in *Russell on Awards*, 2nd Ed., 237, this award could not be sustained—and yet it is obvious that on principle it ought to be so. On the main question of the indebtedness of the defendant the arbitrators concur, and on a point of law they apply to a most competent authority who forms his judgment from the concurring statement of the arbitrators as to the facts, and from his own acquaintance with the law. The question is, will the modern decisions justify us in upholding an award so made.

These are reviewed up to the year 1857, *Hodgkinson v. Fernie*, 3 C. B., N. S., 189, to which I refer, merely as shewing the progress and current of decision, but not as bearing upon the present point. It goes a long way in sustaining awards, however erroneous in point of law, however incompetent the witnesses an arbitrator may have received, or however competent the witnesses he may have rejected. "He is constituted the sole and final judge of all questions, both of law and of fact," and in the absence of corruption or fraud, there is no jurisdiction to control him. Upon this head the subsequent cases of *Hemming v. Parker*, 13 L. T. R., N. S., 795. and *Hutchison v. Hayward*, 15 L. T. R., N. S., 291, are very suggestive.

On the duty of an umpire I would cite, first of all, the case of *Morgan v. Bolt*, 7 L. T. R., N. S., 671, decided in 1863. There the award was made by the umpire and one of the arbitrators, in the absence of the other, without any default on his part, and was properly set aside.—"The substantial

thing required in such a case," said *Blackburn*, J., "is, that all three should meet together and discuss the matter, and hear the arguments and reasons on the one side and the other. A judicial putting of the three minds together should be shewn."

In the case of an arbitration between *Del Comyn* and others, reported in 1864, 10 L. T. R., N. S., 378, an umpire chosen in the usual way, not only received a statement of facts prepared by each arbitrator (to which an exception was taken), but had received samples from the other side without any communication with Messrs. *Del Comyn*, or giving them an opportunity of being heard. And although this was said to be according to mercantile usage, the Court refused to uphold it. The principles they lay down, however, are significant—Per *Erle*, C. J., "The arbitrators collected materials and evidence and were unable to agree. It was the duty of each of them to lay before the other the materials he had collected, and assuming that they came properly to a conclusion that they ought to differ, then they had to appoint an umpire. I am clear that according to the usage the umpire might receive from each of them the materials which he had collected, and that he was not bound by any technical rules of evidence." *Willes*, J., "The umpire is, by the terms of the submission, to decide, if the arbitrators cannot agree. This assumes that the umpire, except in the case of new matter brought before him, on which clearly an opportunity ought to be given to the other side of being heard, is to decide on the materials brought before the arbitrators." *Byles*, J., "It must not be thought that arbitrators and umpires, in cases like the present, are bound by the strict rules of legal evidence, or that awards can be upset by reason of non-compliance with them. If this were so, the great object of referring matters to arbitration would be frustrated."

These two are the latest decisions I have found on the subject of umpires, except that of *Wrightson v. Hopper*, in 1867, 15 L. T. R., N. S., 566, where the selection of an umpire by ballot was upheld under peculiar circumstances.

Let us now glance over for a moment at some of the older cases that were cited at the argument. *In re Tunno & Bird*, in 1833, 5 B. & Ad., 488, *Denman*, C. J., said: "It is objected that the umpire did not hear the evidence. But it is not, in



every case, necessary that an umpire should do so. If, indeed a necessity had arisen, and the parties had called upon him to examine witnesses, his declining to do so might have been a ground of objection."

This doctrine it is not easy to reconcile with the cases *In re Salkehl & Slater*, 12 Ad. & Ell., 767, and *In re Jenkins and Wife*, 1 Dowl., N. S., 276, in the former of which *Littledale*, J., said: "The general rule is, that an umpire to whom a case is referred by arbitration, must hear the evidence over again. Here the umpire, notwithstanding notice, proceeded upon the written examinations. It is contended that the objection to this course had been waived; but the waiver is not clearly made out." This was held in 1840. In the other case in 1841, *Patteson*, J., set aside the award because "the umpire, although specially requested, refused to examine the witnesses. The only case where the notes of the arbitrators can be made the foundation of an umpire's judgment, is where it is done by consent." It will be observed that Lord *Denman's* opinion in the case from 5 B. & A., favours the award in hand. In both the other cases the umpire was in fault. Still it is clear that if the rules as laid down by Judges *Littledale* and *Patteson* are to prevail, this award cannot stand. But the latter, and as I think, the more rational doctrine should govern us.

It cannot be contended that any assent of the parties or any notice to them of the appointment of the umpire was required, either by the submission or by the rule of law. An examination of the facts would have been superfluous and unmeaning where the two arbitrators were in accord. In such a case, surely, if in any, the umpire was justified in using the materials brought before him by the arbitrators.—In doing so, this also being a mercantile case, he came within the very terms of the rule declared by Mr. Justice *Willes*—a name of no small account in law—and having done so and combined in an award, which cannot be assailed upon the merits, and, as I am persuaded, could not now-a-days be attacked in an English Court. I am of opinion that the rule for setting it aside should be discharged. But inasmuch as it has been suggested that it would be better to permit the defendant or his Counsel, if they shall esteem it for his

advantage, to appear before the umpire and adduce evidence as to the facts, or cases as to the law which determines the form of action, I am content that the case should be remitted to the umpire under the 11th section of our Act, chapter 146.

McCULLY, J.—This was the case of an award under a rule of Court where a compulsory reference applied for by plaintiff and resisted by defendant was ordered by the Court, 20th *February*, 1869, under chap. 196, *Revised Statutes*, 3rd series. The rule appointed the arbitrators as therein named, viz., *James Thomson* and *James McDonald*, barristers, with power, if necessary, to appoint an umpire, giving the arbitrators or umpire until the 25th of *March* then next to make an award on such other and further time as should be stated in writing on the rule. The arbitrators enlarged the time for making their award to the 1st *September*, 1869. On the 30th *August*, 1869, they appointed the *Hon. J. W. Ritchie* umpire, who made his award, signed by *James Thomson* as well as himself, on the 31st day of *August*.

This award was attacked by defendant on grounds set forth in the affidavits of attorney *M. B. Daly* and his counsel *W. A. Henry*, viz., that defendant was not notified of the appointment of the umpire, nor permitted to examine witnesses or be heard before him.

Section 11 of chapter 196 enacts as follows: "In case of any such arbitration or reference as aforesaid, the Court or a Judge shall have power at any time, and from time to time to remit the matters referred, or any or either of them, to the reconsideration or redetermination of the said arbitrator or referee, upon such terms as to costs and otherwise as to the said Court or Judge may seem proper." This is a transcript of the 8th clause of 17 & 18 *Victoria*, chap. 125; and in *Morris v. Morris*, 2 Jur., N. S., 542., 6 El. & Bl., 383; 25 L. J. Q. B., 264, cited in *Fisher's Digest*, p. 286, it is laid down that the clause, "The Court or a Judge shall have power to remit the matters to the arbitrator," applies not only to compulsory reference provided for in section 3 of the *English* act, as well as in section 6 of ours, but to all references previously provided for, and therefore to references by consent within section 5 (*Eng. act*). And where

a submission containing a clause that "in case of any motion to set aside an award, the Court might remit the matters referred." *Held*, that such clause did not exclude the general power of the Court to remit the matters under section 8, (11th of our act,) as an arbitration of this power executed. "When an arbitrator made an award describing the plaintiff by a wrong christian name, the Court sent it back to him for correction," 7 *M. & G.*, 1045, 16 *C. B.*, 686. But it is said the Court will refuse to do so on this ground in the absence of a motion to impeach the award; *Davies v. Pratt*, 16 *C. B.*, 162. In *Flynn v. Robertson*, 38 *L. J.*, *C. P.*, 240, 4 *L. R.*, *C. P.*, 324, 17 *W. R.*, 767, *Fisher's Digest*, 9168, where a cause was referred to a master, and at the arbitration it was admitted that something was due to the plaintiff. The master certified there was nothing due. It was admitted on all hands, and stated to the master that he had made a mistake. The defendant, however, objected to the matter going back to the arbitration. *Held*, that the Court had power, and ought to send it back. The Court will not refer matters back to an arbitrator where there has been a long delay, *i. e.*, three years since the last step was taken upon the award, and such delay is not satisfactorily explained. Because the position of the parties may be altered, and they may be unable to produce their witnesses; 22 *L. J.*, *Q. B.*, 321.

In view of the affidavits read on behalf of defendant, and particularly that of *James Thompson*, one of the arbitrators produced by plaintiff in reply, setting forth that he and *James McDonald*, his co-arbitrator had agreed upon the amount of defendant's indebtedness, but disagreeing as to whether the action was rightly brought in the name of the present plaintiffs, had agreed to refer this matter to the umpire, "who decided that the present plaintiffs were the proper parties to bring the suit, and had awarded accordingly, referring to the case of *Tollit v. Saunders*, 9 *Price*, 612. I am of opinion under the powers conferred in the 11th section of chapter 146, and the *English* cases above cited, that the case should be referred back to the umpire, with instructions to cite the parties before him, and furnish them an opportunity to be heard with their witnesses. That the time for making his

award as umpire be extended from the — day of —, and that the cost of the argument herein, as well as the costs of the arbitration and further umpirage, abide the further decision of the Court.

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BENJAMIN v. CAMPBELL ET AL.

To an action on a judgment the defendant cannot plead any fact which might have been pleaded as an answer to the original action.

Where a party has obtained a judgment against another he may proceed upon it at common law, and is not compelled to proceed by writ of *reviver*.

The husband of one of several parties against whom a judgment has been formerly obtained stands in no better position than the other defendants, and cannot plead matter of defence to the judgment that was available in the original action.

DODD, J., now, (July 25th, 1871,) delivered the judgment of the Court :—

This was an action upon a judgment in this Court against *D. Campbell, J. Sutherland, Ellen Sutherland, Catherine Ross and Mary Campbell*. The writ sets out the judgment against all the parties named except *I. Wright*, one of the parties to the second judgment, and that he is now her husband. The defendants jointly pleaded several pleas at law and in equity, and the defendant *Wright* separately pleaded several pleas at law and in equity. The joint and several pleas are in substance the same, alleging that the judgment was founded upon certain promissory notes that were obtained from the parties to them by fraud and misrepresentation.

There is also a plea of *nul tiel record*, and to all the other pleas, except that, the plaintiffs demurred, and the defendants joined in the demurrer. The grounds of the demurrer are, 1st, that no matter of defence can be pleaded to an action on a judgment which existed anterior to the recovery of the judgment; 2nd, that the pleas show the defence they contain was set up against the plaintiff's claim in the suit in which the judgment sued on was recovered, and that the said defence did not prevail, and that it is not competent for the defendants to plead matter of defence to this action which was pleaded to the original action, that the defendants were debarred from setting up their defence, if otherwise competent,

by their *laches*, as they should have long since applied to set aside the judgment. There is no difficulty in disposing of the demurrer to the joint pleas, the law is too clear upon the point to leave any doubt. To an action on a judgment the defendant cannot plead any fact which might have been pleaded as an answer to the original action; *Chitty on Pleading*, vol. 1, 7th ed., 512, and the original defendant or his bail or sureties cannot plead that the judgment had been obtained against him by fraud; *Moore v. Bowmaker*, 6 Taunton, 379. In an action between the same parties on a replevin bond executed by defendant as one of the sureties in the bond, a plea by the surety that the judgment was obtained against the principal by fraud was held bad; on demurrer the counsel in that case argued that tho surety was a stranger to the judgment, and might therefore falsify it, but the argument failed with the Court; 7 *Taunt.*, 97. It cannot be said that *Wright* is any more a stranger to the judgment against his wife than the surety was a stranger to the judgment against his principals. The marriage of *Wright* with *Catherine Ross* after the judgment against her made him liable for her debts; but it gave him no advantages to contend against the liabilities of his wife beyond those she legally possessed had she remained sole and unmarried.

It was said at the argument that the action should have been by writ of revivor, as *Wright* was a stranger to the original judgment, but I can find no authority for this. In *England*, if the party proceed by action on the judgment he may by statute be deprived of his costs, unless the Court should otherwise order; but I am not aware of any law that prevents a party having obtained a judgment against another from proceeding by action at common law upon the judgment, and compels him to proceed by writ of revivor. If the application had been to issue executions, then the cases cited by the counsel for the defendant would have applied, but it does not appear to me that they have any application to an action on the judgment, and while for every defence *Wright* had to the writ of revivor, he would have the same to the present action. In *Phillipson v. The Earl of Egremont*, 6 A. & E., N. S., 587, cited on both sides at the argument, the action was *scire facias* by a public officer against the defendant, who

was a member of a company against the secretary of which a judgment had been recovered. There were several pleas pleaded, but I intend to refer to the 4th and 5th only. The 4th stated that the company was not formed by any deed of partnership, &c., in compliance with the statute, &c. *Held* bad on special demurrer, as setting out a defence that might have been pleaded to the original action. The 5th plea that the original action was for a demand in respect of which neither the defendant in the *scire facias*, the company, nor the defendant in the original action was by law liable, as plaintiff at the commencement of this action well knew, and that the officer of the company and the plaintiff well knowing the premises, the officer of the company fraudulently and deceitfully, and by connivance with plaintiff suffered the judgment in order to charge the defendant in the *scire facias*. *Held*, that the plea was good as containing a sufficient allegation of fraud and collusion between plaintiff and the nominal defendant in the original action, and that the defendant in the *scire facias* was entitled to avail himself of such defence by plea. This case is strongly in support of the demurrer to the pleas; in the first place it shows that although the defendant was not on the record in the original action, he was not permitted to set up any defence to the *scire facias* that might have been pleaded to the original action, and that he was permitted to set up fraud and collusion between plaintiff and defendant in the original action for the purpose of charging defendant in *scire facias*, and because, as I assume, he had no opportunity of doing so in the original action. The permission to show fraud between the plaintiff and defendant when the defendant had no opportunity of showing it in the original action, is very different from the case under consideration. Here the defendant not only had that opportunity, but put it in the record as part of the defence, and failed to prove it. If under such circumstances a judgment could now be defeated by a plea of fraud, and particularly after the defendants for several years had remained quiet, knowing of the judgment, and, as they assert, how it was obtained, and yet taking no steps to set it aside, judgments as a security hereafter would lose the high position they have hitherto retained in the courts of law of the country.

In *Moses v. McFarlane*, Burrows, 1810, Lord Mansfield said it was most clear that the merits of a judgment could never be overhauled by an original suit either at law or in equity; till the judgment is set aside or severed it is conclusive as to the subject matter of it to all intents and purposes. I do not think *Wright*, as the husband of *Catherine Ross*, one of the parties against whom the original judgment was obtained, stands in a better position than either of the other defendants in the cause, and that he cannot now get up any defence that was available in the original action. I, therefore, think judgment should be for the plaintiff upon the demurrer to all the pleas demurred to, with costs.

JOHNSTON, E. J.—The writ sets out a judgment in the Supreme Court of this Province against all the defendants except *John V. Wright*, and as to him that he married one of the defendants after judgment. All the defendants except *Wright* plead together; he pleads alone. The pleas are to the same effect,—that the judgment was obtained on certain promissory notes fraudulently obtained—and the judgment was obtained by fraud and misrepresentation generally. There is also a plea on equitable grounds, setting out the special circumstances of fraud, and alleging that on the trial certain evidence to sustain the defence of fraud set up was not given through mistake, &c.

All the pleas which allege fraud specially, and also the equitable plea are unquestionably bad. A distinction has been drawn between them and those alleging fraud generally; that the latter may refer to fraud practiced in the mode of procuring the judgment to be signed, and I was of opinion that even so the pleas would be bad, because it being uncertain whether they were intended to meet a case of fraud in the mode of procuring the judgment which it was supposed might be good, or to meet a case of fraud on the merits, such for instance as set out in the special pleas, which would be bad; the defendant should in his plea have removed the uncertainty. I am inclined to think, however, that the pleas of fraud are bad on a broader ground. The judgment, I think, imports verity in the one case as in the other; and that fraud in either particular can only be redressed by having

the judgment vacated, or set aside, or reversed, but it is unnecessary for me to go so far in the view I take on the narrower aspects. As regards the defendant *Wright*, he is in these particulars bound by the judgment to the same extent as his wife.

*Mr. Johnston*, at the argument, took exception to the writ on the ground that debt would not lie against the defendant *Wright*, and that *scire facias* was the only writ that could avail after his intermarriage with one of the female defendants. I have made a careful and extended research, the result of which is that *scire facias*, when there is a change of parties, is the ordinary remedy, so much so that none other is alluded to, except in the *dictum* cited by *Mr. Weatherbe* from *Dry's Common Law Procedure Act*. But I nowhere find in so many words that it is the only remedy, or that debt will not lie. There are considerations which might lead to the opinion that debt would lie,—as that it is an action for a sum certain, &c. But this is a sum certain, and if *scire facias* did not lie at Common Law—as would seem to have been the case—debt must have been the only remedy.

Our own statute does not in any way assist the argument. It gives the writ of *scire facias*, but does not either directly or by any inference negative the action of debt. I cannot, therefore, say that debt will not lie, especially with the doctrines in a respectable book of practice in favor of the action, and no authority the other way.

I am, therefore, of opinion that there should be judgment for the plaintiff on the demurrer to all the pleas demurred to.



## SIBLEY v. SIBLEY.

TROVER is maintainable by the owner of property against the purchaser, where a third party to whom the owner has given the use of the property has sold it without authority. The rule is that where there has been a misuser of the thing lent there is an end of the bailment and trover is maintainable.

RITCHIE, J., now, (July 25th, 1871,) delivered the judgment of the Court:—

The rule taken by the defendant to set aside the verdict should in our opinion be discharged. The case was properly put to the jury by the learned Judge who tried the cause, and the evidence would have justified a verdict for a large amount. The only doubt I entertained on the argument was whether the plaintiff could maintain trover against the purchaser of the property, the use of which he had given to the vendor, during the latter's life.

In order to maintain trover a party must have a right to the possession of the property in goods, and therefore in general it will not lie at the suit of an owner who has demised them for an unexpired term; and in *Gordon v. Harper*, 7 T. R., 9, it was held that where furniture leased with a house had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against him pending the lease. There it will be perceived that the tenant had himself done nothing to forfeit his right to the property under the lease; but in the case before us the party entrusted with the goods disposed of them for a purpose different from that for which he was entrusted with them, and tortiously, and in violation of the rights of the plaintiff, conveyed them absolutely to the defendant.

In *Loeschman v. Mackin*, 2 Stark, 311, the hirer of a piano sent it to an auctioneer to be sold. *Abbot, J.*, held that though the hirer of goods has the possession of them for the special purpose for which they were given to him, yet if he send them to an auctioneer for sale he is guilty of a conversion, and if the auctioneer afterwards refuse to deliver them to the owner he is also guilty of a conversion. In *Farrant v. Thompson*, 5 B. & Ald., 826, where mill machinery had been demised with the mill, and the tenant severed the machinery, and it was seized by the sheriff and sold, the Court

held that no property passed under the sale, and that the landlord could maintain trover even during the continuance of the term. *Gordon v. Harper* was relied on for the vendee as expressly in point, but *Abbot*, C. J., said: "I thought at the trial, and still think, that there is a material distinction between this case and *Gordon v. Harper*, where the property was personal, and the tenant had not by any wrongful act put an end to his qualified possession of it;" and *Bayley*, J., said the goods were parcel of the inheritance, and belonged to the tenant to be used in a particular way, and he by his own act put an end to this qualified possession. In *Cooper v. Willomatt*, 1 C. B., 672, a party conveyed goods to another by bill of sale, who allowed the former to use them at a weekly rent,—he undertaking to deliver them on demand. The person so entrusted with them sold them to a *bona fide* purchaser, and it was held that trover could be maintained against the purchaser. This case was since fully argued, and *Gordon v. Harper* was again cited to show that in trover a plaintiff must have right of possession as well as right of property. *Tindall*, C. J., said: "Supposing the tenancy not to have been determined, I cannot get over the authority of *Leeschman v. Machin*, and I am not prepared to dispute the position taken by C. J. *Abbot* in that case." In *Bryan v. Wardell* 2 Exch., 479, where a similar question arose, *Pollock*, C. B., said the case of *Cooper v. Willomatt* was a decisive authority. It was there held that a bailee of goods for hire, by selling them, determines the bailment, and the bailor may maintain trover against the purchaser though the purchase was *bona fide*. The cases on the subject are referred to there. The rule is that where there has been a misuser of the thing lent, there is an end of the bailment, and trover is maintainable.

The authority of these cases, and others which are referred to in them, lead to no other conclusion than that trover could be maintained in the case before us. If the sale to the defendant had been authorised by the plaintiff, as it was contended on the argument was the case, he must have failed in the action on that ground, but I can infer no authority from the evidence, and the jury to whom that question was submitted have by their verdict negatived any such authority.

## DESBARRES ET AL V. SHEY.

W., under whom defendant claimed, entered into possession of a lot of land in 1834, under a judgment recovered against T. in an action of ejectment, and continued in possession for a period of thirty years. In 1946 T. conveyed to the plaintiff, who, in the following year, went upon the land, and had it surveyed.

*Held, per JONKERON, E. J., DODD, J., and RITCHIE, J.,* that the entry and survey by the plaintiff were not a sufficient interruption of the adverse possession of W. to prevent the operation of the Statute of Limitations.

*Per RITCHIE, J., SIR W. YOUNG, C. J., dubitante.*—T. having been out of possession and W. in possession under his judgment, when the former made his deed to the plaintiff, no title passed under it.

SIR W. YOUNG, C. J., while concurring with the majority of the Court as to defendant's possessory title, reviewed the conflicting documentary titles of the plaintiff and defendant at length, and referred fully to the township grants in which the property in dispute was included. He was of opinion, under all the circumstances, that there should be a new trial.

WILKINS, J., was also of opinion that there should be a new trial.

DODD, J., now, (July 25th, 1871,) delivered the following opinion:—

This was an action of ejectment for farm lot 81, in the township of *Falmouth*, tried before *Mr. Justice Johnstone* at *Windsor*, in *September*, 1869, when a verdict was found for the defendant. A rule for a new trial was granted, and the cause was argued in *December* last. The plaintiff claims the land under consecutive conveyances from *Joseph W. DesBarres*, who held by grant from the crown dated 8th *April*, 1768. He conveyed by deed dated 8th *April*, 1819, two undivided thirds of 7000 acres in *Falmouth*, called *Castle Frederick*, to the *Misses DesBarres*, and they conveyed lot 81 by deed dated 1st *March*, 1822, to *Richard Trenholm*, and he conveyed the same lot 2nd *September*, 1846, to the plaintiff *Win. F. DesBarres*. The grant gave 2000 acres to the grantee. The deed from him to the *Misses DesBarres* does not give lot 81 by name. neither is it described by metes and bounds, but the subsequent conveyances to *Trenholm* and the plaintiff *DesBarres* not only name it as lot 81, but describe it by courses and

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NOTE.—The judgment of the Court in this case (*DesBarres v. Shey*) was delivered by the late Mr. Justice *Johnstone, E. J.* This judgment has unfortunately been lost, and, although a careful search has been made, no trace of it has been discovered. A copy of the dissenting opinion of Mr. Justice *Wilkins* came into the possession of the editors, but it was in too imperfect a condition for publication. The original of this judgment was also lost. The opinion of the majority of the Court, however, appears in the judgment of Justices *Dodd* and *Ritchie*, while Mr. Justice *Wilkins*, who dissented, agreed substantially, with His Lordship the Chief Justice. The opinion of the majority of the Court was sustained on appeal to the Privy Council. 29 *Law Times Reps.*, (New Series,) 502.

THE EDITORS.

distances. The first attempt to reduce the lot into possession by the *Misses DesBarres* was in 1830, when they employed a surveyor to survey the *Castle Frederick* property, and in making that survey he surveyed lot 81 under the belief that it was included in the *Castle Frederick* lands, and found the traces of an old survey, but no person living upon the lot, and no fences and no improvements upon it; the wood had been cut down in places, but had grown up again. Those facts I take from the two witnesses that were at the survey, the surveyor himself having left the Province some years before the trial, and being supposed to be dead. In *March*, 1832, shortly after the title passed to *Trenholm*, he was put into possession of the lot by the agent of the *Misses DesBarres*, and, with the assistance of several persons, in one day he cut down some trees and built a house upon the lot. When cutting down the trees *Robert Walker* appeared with another person, and warned *Trenholm* and those that were with him not to trespass on the lot, as it was his property. Notwithstanding the warning the house was built, and *Trenholm* resided in it for about a year. He cleared up a piece of the land, fenced it, and had grain growing upon it, but in the following year of 1833 he abandoned the lot, and it was then taken possession of by *Robert Walker*. *Trenholm* did not return to it, nor apparently take any further trouble about it until he conveyed it to the plaintiff *DesBarres*, in *September*, 1846. In *January*, 1847, the plaintiff *DesBarres*, with *Harvey*, a surveyor, went upon the lot and had it surveyed. He then found *Ferguson* residing upon it in a house built by the authority of *John Walker*, son of *Robert*. The plaintiff warned him off, but he did not go, and remained there for two years afterwards. From that time we hear nothing more of *DesBarres* and his claim to the lot, until about ten years before action brought, when he directed *Bain* to look after it for him, who took a few loads of wood off for the performance of that duty; but his acts were extremely equivocal, and the same witnesses that proved them also proved that at the same time the lot was called *Walker's* lot, and that *Northup* used it as his wood lot, and exercised control over it. They also proved that *Bain* was prosecuted by *Walker* for the trespass in taking wood off the lot.

I have now given a short statement of the plaintiff's case, and shown what he and those he claims under did to retain the possession of the lot, so as to exclude an adverse possession by others. The defendant set up first a paper title to the lot, and, secondly, the *Statute of Limitations*. As to the first, although several deeds were proved, I do not think they sufficiently connect with each other to prove a continuous title down to the defendant, until we commence with a deed of exchange between *John Walker* and *George Morrison*, dated 30th April, 1805, by which lot 81 was transferred to *Walker*. There is no evidence to show that *Morrison* was ever in possession of lot 81; but about 1815 *Walker* commenced to exercise a control over the lot by cutting and hauling wood off it, and this was continued by his family and others by his directions until his death. By his will, dated January, 1828, he gave the lot to his son *Robert* for life, and after his death to *Robert's* sons, equally to be divided between them in fee. *Robert* took the life estate under the will, and that gave him color of title and a constructive possession of the whole lot. He, as his father did before him, used the lot for some time as a wood lot, and in the fall of the year 1831 burnt a piece of the ground, which he fenced and planted the following spring; about two and a-half acres. It was about this time that he found *Trenholm* on the land preparing to build a house, and warned him off. The warning was followed by an action of ejectment in the Supreme Court at *Windsor*, and a recovery by the verdict of a jury. Judgment was signed 1st June, 1833; the demise was laid 3rd April, 1832. It does not appear that there was any *habere* issued to put *Robert Walker* in possession, and it was unnecessary, as *Trenholm* had removed from the property, leaving the house vacant, and taking with him all his moveable property. I admit that the judgment does not conclude the title, and the unsuccessful party could immediately have commenced another ejectment, but it transferred the possession to *Walker*, and from that time we must consider him as holding adverse to the true title, if there was any title superior to his own.

*Parke, B.*, in *Barnett v. Earl of Guildford*, 11 Exch., 19, said it appeared to be the established practice, when the plaintiff seeks to recover mesne profits continuing to the day of the demise from

the tenant in possession, or at any date from an occupier not the tenant in possession, that the plaintiff may recover them if he proves his title to the possession at the time the profits were so taken, and also the execution of the writ of possession or *actual possession* taken, for taking actual possession has the same effect as the execution of an *habere facias possessionem*. The possession of his father enabled him to dispose of the lot by will; *Asher v. Whitlock*, 1 L. R., Q. B., 1. A person in possession of land without other title has a devisable interest, and the heir of the devisee can maintain ejectment against a person who has entered upon the land, and cannot show title or possession in any one prior to the testator. *Cockburn, C. J.*, said: "I take it as clearly established that possession is good against all the world except the person who can show a good title, and it would be mischievous to change this established doctrine." As to the possession of *Robert Walker*, I will take the evidence of *Harvey*, the surveyor of the plaintiff, in 1847. He says: "We found *Ferguson* living upon the lot, and we went to his house; he set up no claim to the land; said that he was a tenant, that the *Walker* family had put him there." The plaintiff then told him to quit the premises, but he remained for about two years afterwards. No notice was given of the survey to the *Walker* family except to the widow of *Robert*, who died in 1842. She came and forbade the survey and claimed the land. Two of her sons were then living with her, but no notice of the survey was given to them. *Harvey* says: "*Robert Walker* went into possession after *Trenholm* left; the first thing he did was to cut down the trees along the proprietor's road; he fenced as he cleared by sections, year after year, the whole front, including what *Trenholm* had cleared." He was six or seven years clearing, perhaps more, and his possession was open and notorious; took crops off and pastured cattle, and remained in possession until his death. After his death the widow and her sons continued to use and occupy the land as a pasture. *Ferguson* had been in possession two or three years at the time of the survey, and occupied to the west of the mill road, while the family occupied between the roads. *Ferguson* had between twenty-five and thirty acres; this *Robert Walker* enclosed with a fence. In 1850 or 1851 the

land was still enclosed, but a good deal grown up. The lot was surveyed for *Robert Walker* in 1832, and again in 1837 by *Armstrong*. In 1846 *Northup* occupied lot 81 as a wood-lot for wood and poles, and continued to occupy it for ten years, and paid rent for the lot, the first year to the widow and her son, and subsequently to *Shey*, the defendant. After *Trenholm* left, *Walker* put *Bill* into the possession of the house, who paid him rent for it. *Shaw* succeeded *Bill* in the house, but for what time he occupied does not appear. Several witnesses testify to the same facts of the possession of the lot by the *Walker* family, or by their tenants, until it passed into the hands of the defendant. *Robert Walker* at his death died intestate, leaving three sons him surviving, *Robert A.*, *Daniel G.*, and *John*, who took under their grandfather's will lot 81 in fee, and in 1851, 1852 and 1855, conveyed by their respective deeds the lot to the defendant. In his evidence he says: "In the fall of 1843 I hired the farm and the wood-lot from the widow and her son and paid them rent; got a good deal of wood and poles off that winter; left in 1844. In 1846 *Northup* got the lot and continued for ten years in possession. About a year after he got the lot the widow and her sons went to the *States*, and left witness as agent to look after the property, and he collected the rents until he purchased, and since then he has used 81 as a wood-lot.

I have considered it unnecessary to extend the evidence, although I may have omitted important parts showing the uninterrupted possession of the *Walker* family from 1833 to the purchase by *Shey*, and from that time to the present action, covering a period of 35 years, without any interruption from the plaintiff or those under whom he claims, except his survey in 1847, and his authority to *Bain* to look after the lot. It is impossible not to see that the plaintiff *DesBarres* or his agents have been neglectful of his interests. He had sufficient notice of claims opposed to his own when he went to make his survey; he then found a person in possession as tenant to the *Walkers*, and who remained there for two years afterwards, and at that time some twenty-five or thirty acres cleared and improved and under fence, and yet with the exception of directing *Bain* to look after the lot, no step whatever was taken until the bringing of the present

action. The Act of 1866 enacts, sec. 1, "That after the 31st December, 1866, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry distress, or bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same." This section is similar to section 2 of 3 & 4 Will. IV., chap. 27, and that has been held as a general rule that the action must be brought within twenty years after the original right of entry of the plaintiff, or the party under whom he claims accrued, whatever be the nature of the defendant's possession, 1 *Smith's Leading Cases*, 396, but the statute does not apply to cases of want of actual possession by the plaintiff, but to those only where he has been out of it, and another has been in for the prescribed time, for there must be both absence of possession in the person who has the right, and actual possession by another whether adverse or not to his possession to bring the case within the statute; *Smith v. Lloyd*, 9 Exch., 562.

In the case under consideration the evidence is conclusive that the defendant and those under whom he claims from 1833 to the commencement of the action in 1868 have been in possession, and that the plaintiff and those under whom he claims have been out of it, unless his going upon the land in January, 1847, and causing the lot to be surveyed and warning the party off that he found in possession, can be held an entry and taking possession; then in that case, as the full period of twenty years from that entry had not expired in 1866, he would by the 9th section of the Act have five years after its passing to make an entry or bring his action. The question, then, turns upon the acts of the plaintiff *DesBarres* in January, 1847, and if they will not assist him, then his directions to *Buin* ten years before action brought cannot avail him or benefit him in any manner whatever, as at that time over twenty years adverse possession had run against him. Section 5 of the Act is: "No person shall be deemed to



have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon." The 3 & 4 Will. IV. contains a section the same as section 5 in our Provincial Act. *Randall v. Stevens*, 2 E. & B., 641. In that case actual possession was taken *animo possedendi*, and held to be a sufficient entry. There a party had been let into possession as tenant at will, but never paid rent, and before twenty-one years had elapsed the party entitled to the property entered upon it and turned the tenant and his family out with nearly the whole of his furniture. The tenant immediately after resumed the possession, but no fresh tenancy at will commenced, and he paid no rent. *Held*, that the party claiming might enter at any time before the lapse of twenty-one years from such resumption of possession by the tenant, notwithstanding the lapse of twenty-one years from the first letting him into possession, and was not barred by the statute; *Doe d. Baker v. Coombes*, 9 Common Bench, 714. The defendant being in adverse possession of a hut and piece of land, the lord of the manor entered in the absence of defendant but in the presence of his family; said he took possession in his own right, and he caused a stone to be taken from the hut and a portion of the fence to be removed. *Held*, that those acts were not sufficient to disturb the plaintiff's possession, but a mere entry within the meaning of the Act. In that case *Wilde*, C. J., said, "the defendant's wife and family were not removed from the premises or desired to remove; unfortunately the plaintiff did not do enough to secure his rights. The defendant is not to be prejudiced by what was done in his absence; the acts done clearly amounted to no more than an entry, which, since the late act is not sufficient to bar the tenant's rights, unless accompanied by circumstances that would restore the possession of the land to the lord. The tenant was not removed, nor was anything done to disturb him in his possession. His possession having commenced adversely more than twenty years ago, and nothing having occurred to disturb it or put an end to it, the ejectment is too late." How much less was done by the plaintiff *DesBarres* to disturb the possession of the *Walkers* than was done by the lord in the case referred to? No notice was given to them of the

intended survey, and they were not present when it was made. The tenant *Ferguson* was found residing upon the property and he had notice to leave it, *DesBarres* being informed by him that he held under the *Walkers*, and there rested the proceedings of the plaintiff at that time. Before the Act a mere entry upon lands was of no force to satisfy the then *Statute of Limitations*, 21 Jac. I., chap. 16, unless an action was thereupon commenced within one year after and prosecuted with effect; *Cole on Ejectment*, 16. It is impossible to construe the survey of 1847 as an entry by the plaintiff in the face of the authorities I have referred to. Finding a person in possession it is reasonably to be supposed he would have lost no time in either pulling down the house, if he considered *Ferguson* a trespasser, or bringing an action without delay, and not leaving him as he did for two years after warning him to quit. The persons under whom *Ferguson* held would naturally conclude that any claim the plaintiff supposed he possessed to the lot he abandoned.

At the argument the counsel for plaintiff contended that, admitting there had been an adverse possession, it had been abandoned before action brought; but the evidence does not sustain that view of the case. *Northrup* leased the property in 1846 from the widow of *Robert* and her son *John*, and continued to occupy it for ten years, paying rent during that time. Saying nothing of the defendants' occupation after 1856, up to the time when the action was brought, there would be twenty-two or twenty-three years adverse possession, which would bar the plaintiffs' subsequent right to bring the action. The Act expressly extinguishes all right and title of the party out of possession, and gives title to the party in. *Scott v. Nixon*, 3 D. & W., 388; In ejectment plaintiff proved twenty years' possession, ending about ten years before the commencement of the action, and for those ten years the defendant had been in possession. Held the plaintiff was entitled to recover. *Doe d. Harding v. Cooke*, 7 Bing., 345. The question in ejectment is whether the plaintiff is legally entitled to actual possession, not whether the defendant has any title. *Doe d. Dand v. Thompson*, 13 Q. B., 674-9. To bring the plaintiff within the ruling in that case, whatever his documentary title may have been as derived from the grantee of the Crown,

he must show that his action has been brought within twenty years after the right first accrued to make an entry or bring an action to some person through whom he claims, or within twenty years after the time when his own right first accrued, but in my opinion he has failed in proving either the one or the other. The plaintiff's mere entry and warning the party off the land that he found in possession, and allowing him to remain there for two years afterwards, cannot be held equivalent to an entry; instead of its being an entry and taking possession by plaintiff it continued as before the warning to be the possession of the defendant or those under whom he claims.

There were some further objections taken to the verdict at the argument, but it becomes unnecessary for me to refer to them, as my opinion is founded upon a sufficient adverse title in the defendant, and that was left to the jury and found by them in favor of the defendant; therefore whether the learned Judge was correct or otherwise in saying that the Crown could not give a subsequent grant to the one it had previously passed, for the same land, becomes immaterial to this inquiry. So the inquiry as to whether the deed to *Trenholm* from the *Misses DesBarres* includes lot 81 or otherwise is also immaterial. I have assumed that it did, and that *Trenholm* went into possession under it, but was dispossessed by *Robert Walker*, and from that time adverse possession commenced against him and those claiming under him. The plaintiff must remove every possibility of title in another before he can recover, no presumption being admitted against the person in possession; *Richards v. Richards*, 15 East., 294. If the plaintiff in this cause was left to his documentary title, he could not recover without some presumption drawn in his favor both of law and fact. The rule again as to new trials in ejectment is against the plaintiff. The Court will not give a new trial upon the application of the plaintiff on the ground of the verdict being against evidence, where there is any evidence to go to the jury in support of the verdict; *Fighe v. Hickey*, vol. 1, Irish Law Reps., 343. And a new trial is seldom granted in ejectment when the verdict is for the defendant, because all the parties remaining in the situation they were previously to the commencement of the action the

claimant might bring a second ejectment without subjecting himself to additional difficulties; *Adams on Ejectment*, 286; 2 *Chitty's Archbold*, 1336, 8th ed. The granting of a new trial in ejectment is strictly speaking in the discretion of the Court, and where evidence has been rejected or admitted, the Court will not grant a new trial if with the evidence rejected a verdict given for the party offering it would be clearly against the weight of evidence, or without the evidence received there would be enough to warrant the verdict; *Hughes v. Hughes*, 15 M. & W., 701; *Crease v. Barratt*, 1 Cr. M. & R., 919; 16 M. & W., 497. The question raised at the argument respecting the rejection and the admission of evidence by the Judge at the trial did not affect the adverse possession of the defendant in any manner, and now becomes immaterial in deciding this case in the view I take of it. I therefore think the rule for a new trial should be discharged with costs.

RITCHIE, J.—The learned Judge in his charge to the jury told them that neither plaintiff nor defendant had shown a documentary title to the land in dispute, and that the documents in evidence were only effective as giving character to the possession; that in his opinion the grantees under the grant of 1761 were entitled to certain quantities of land within defined limits, and although those limits enclosed more land than sufficient to satisfy the grantees, yet they had defined rights over the whole, and the Crown could not before allotment had been made to the grantees, grant a defined lot in severalty to *Governor DesBarres*.

The grant of 1761 erected a tract of land comprising 50,000 acres into a township, and gave 65 shares of 500 acres each to the several grantees named in it, to be divided into one or more lots to each share, and share alike as should be agreed upon by the major part of them, and in case this should not be done, the Governor was to direct a partition to be made by such person or persons as he should appoint, thus leaving within the township 17,500 acres in the Crown undisposed of by the grant.

There is no little difficulty in giving a satisfactory construction to a grant of so unusual a character, yet I cannot

bring myself to the conclusion that the Crown could not grant portions of the 17,500 acres in severalty before any allotment had been actually made to the grantees, provided sufficient land was left to give to all of them their full complement as specified in the first grant, and there is no evidence, in my opinion, of the land in question, lot 81, having been allotted to any of the grantees under the grant of 1761, or of any person having acquired a title to it anterior to that grant so as to bring it within the clause in it which reserves all previously acquired rights. But whether the learned Judge was correct in the view he took of the law in this respect or not is of the less importance, as the evidence of possession on the part of the plaintiff was such as, in my view of the case, entitles him to a verdict, and the learned Judge correctly charged the jury that the plaintiffs could not recover if those under whom the defendant claimed had been in full, exclusive and adverse possession for twenty consecutive years before the commencement of the action, though the documentary title of the plaintiff was perfect. Supposing the title of *Trenholm*, one of the plaintiffs, to have been unquestionable under his deed from the *Misses DesBarres*, the effect of the judgment in ejectment which *Walker*, under whom the defendant claims, obtained against him, and the entry by *Walker*, and the quitting of the possession by *Trenholm*, was without, concluding the title, to confer on *Walker* the legal possession, though he might not have actually occupied or used the land, unless he manifestly abandoned the possession; in other words, actual possession taken under a judgment in ejectment is deemed to continue in the party obtaining it and those claiming under him till interrupted by a conflicting possession, or discontinuance of possession by some act of abandonment.

In the year 1832 *Walker* brought ejectment, and in 1834, obtained judgment against *Trenholm* after defence, for this particular lot, No. 81 by name. As soon as judgment was obtained *Trenholm* left the lot and *Walker* went into possession of it and rented it to a man named *Bell*. There is no evidence of the defendant, or those through whom he claims, having since abandoned possession by his or their acts, or of having lost the possession or right to

it by any act of the plaintiffs. It is quite true the judgment in ejectment did not conclude the title, the claimant recovering only the possession of the land, but while it did not conclude the title, it very materially altered the position of the parties; a judgment is an act of law, and a judgment in ejectment, while it continues in force, destroys the right of possession which the adverse party had, and gives a right of possession to the party who recovered it, and it is this which confers on him his right to a *habere facias possessionem*; see *Taylor d. Atkyns v. Horde*, 1 Burrows, 60; see also *Buller's* note to *Co. Lit.*, 239; and in 3 *Blackstone's Com.* 19, a judgment given against either party, whether upon his own default or upon trial of the merits, in any possessory action, if obtained by him who hath not the true ownership, is held to be a species of *deforcement*, which, however, binds the right of possession and suffers it not to be ever again disputed, unless the right of property is also proved. It was contended on the argument that though after the judgment *Trenholm* left the possession and *Walker* entered, yet as no *habere facias possessionem* was taken out, the change of possession did not take place as the effect of the judgment; but Lord *Mansfield* in delivering the judgment of the Court in *Taylor v. Horde*, on the special verdict in ejectment, referring to the effect of a former judgment in ejectment, said: "The jury find that soon after the judgment in ejectment the party entered and was in possession; this must be taken to be an entry in consequence of the judgment; and again the entry is not unjust and *sine judicio*, but under authority of a court of justice and lawful, and cannot be treated as a disseisin. The true owner may enter upon a disseisin, but after a judgment in ejectment an actual entry would not be permitted." In *Wilkinson v. Kirby*, 15 C. B., 430, *Maule, J.*, said: "Suppose the plaintiff wants to show a possessory title in him, would it not be enough for him to show an ejectment brought, a judgment by default, and an entry under that judgment;" and again, "it is not simply an act done; the plaintiff institutes proceedings in ejectment to recover land of which the defendant is in possession, and recovers judgment and enters upon the land, the defendant being a party to the ejectment;" and *Jarvis, C. J.*, "What has the defendant to do with a writ of possession,

executed? Estoppel need not be of record. You admit, that if after the recovery in ejectment the defendant had surrendered the possession that would have done. What difference does a writ of possession make? In the one case the tenant is turned out, and in the other he acquiesces in the judgment."

In the present case *Walker* entered under his judgment in 1834, and *Trenholm* then quitted possession, and *Walker* and those claiming under him having been in possession in the eye of the law from that time until the commencement of this action, a period of upwards of thirty years, they have acquired a good title to the land whatever the title of *Trenholm* may have been anterior to the judgment. In *Taylor v. Horde*, Lord *Manfield* said: "An ejectment is a possessory remedy, and it is necessary for the plaintiff to show that his lessor had a right to enter by proving a possession within twenty years, or accounting for the want of it under some of the four exceptions of the statute. Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession. And here I may remark that *Trenholm*, having been out of possession, and *Walker* in possession, under his judgment, when the former made the deed to Judge *DesBarres*, no title passed under it, so that if the plaintiffs could recover at all in this action, it must be on his (*Trenholm's*) title and right to the possession. As the jury would not have been warranted, in my opinion, in finding a verdict for the plaintiffs, I can see no object in sending the case to another trial, even though the Judge may have erred in the view he took of the plaintiffs' documentary title.

SIR W. YOUNG, C. J., *dissentiente*.—This is an action of ejectment for one of the farm lots, No. 81, in the township of *Falmouth*, containing 158 acres, which has been twice occupied and partially cleared by parties under whom the plaintiffs and defendant claim, but is now described as having been abandoned for twenty years, and with fir trees grown up thick upon it. It is claimed by Judge *DesBarres*, by whom the action was brought, as part of the *Castle Frederick* estate, and the case has acquired an importance which does not properly

belong to it, because the grant to Governor *DesBarres* in 1768 covers that estate as well as this lot, and the validity of that grant is now called into question. The defendant again, claims under parties deriving title from the original grants of the township in 1761 and anterior to that date, and from the proprietors' and allotment books which were in evidence. The learned Judge in Equity, before whom the case was tried, was of opinion that neither party had made title, and that both must rest on possession under claim of right, when the *onus* of course lay upon the plaintiffs. There was a large mass of testimony in the cause, which was put to the jury, who found for the defendant. On the point of possession, if left to the unbiassed decision of the jury, it would be impossible, I think, to disturb this verdict. The evidence I do not propose to go into,—it is largely reviewed in one of the judgments about to be delivered, and, in my view, does not materially affect the questions on which the case must ultimately turn. It is plain that the action was brought on the ground of title, and not merely of possession, and if the title is not in the plaintiffs or one of them, they cannot succeed. The peculiarity of the case is, that there are two distinct streams of real or pretended title, and two distinct sets of possession, sometimes concurrent but conflicting, and sometimes intermitted. It is necessary, therefore, to look at the origin of both rights.

The Proprietors' Book, an ancient and venerable document, patched and renovated, and containing some curious touches of the manners that prevailed more than a century ago, opens on the 9th *June*, 1760, after the passing of the first grant, the date of which does not appear, and when a considerable population had settled on the land. It could not have been long-settled, for half of a small house assigned to Colonel *Denson* was appropriated or reserved, as long as it should be needed, to store the provisions allowed to the proprietors by His Majesty *George II.* or *III.* In *July*, 1760, various houses and barns which were probably put up by Government, and are numbered from 1 to 33, were divided by a committee,—a thousand acres were set apart for town lots, next to which the cleared upland was also to be laid out. By the 15th *November* the house lots, six acre lots, formed, we may pre-



sume, out of the 1000 acres, and the farm lots had been numbered and were drawn for or draughted on that day: and at the same time it was voted, at a meeting duly called, that a committee consisting of Col. *Denson*, and Messrs *Cole* and *Stoddart*, should make a resignation of the grant then subsisting, and procure a new grant of the township for and on behalf of the proprietors. At a subsequent meeting of 23rd March, 1762, a committee was named to receive of Col. *Denson* the old grant, and exchange it for the new one, which appears to have contained more land than the old.

By the new grant, dated 11th June, 1761, after reciting that the old grant, as the proprietors apprehended and were advised, would for many deficiencies be insufficient to secure to them their property, and, therefore, that they had surrendered the said grant and requested a new one for the more fully assuring to them and their associates their rights and shares therein, the then Governor proceeds to erect the tract of land, described by metes and bounds into a township of 50,000 acres, to be divided into 100 shares or rights of 500 acres each, 65 of which he grants and confirms to the parties therein named, with two shares for the use of the church and school forever, saving always the previous rights of any other person or persons to the said tract of land or any part thereof, each share or right to consist of 500 acres, and to be divided into one or more lots as should be agreed upon by the proprietors or grantees or otherwise, by a partition directed by the Governor. It will be observed that 35 shares, equal to 17,500 acres, remained ungranted, of which the Crown remained tenant in common with the 65 grantees.

Now this grant is of itself subject to some technical objections. It is the Governor and not the King who grants, though he attaches the great seal of the Province, and although such grants have been received without objection, (*James' Reps.*, 184; 10 *Moo. P. C. C.*, 502;) and this Court would be very slow to reject them, it is not easy to reconcile them to legal principle. Then, again, the surrender of the first grant is made by parol, and not by matter of record, unless the recital can be so accounted, which in the case of a private person, and as it would seem also in that of the Crown, is insufficient; 4 *Co.*, 546; 1 *Dow's Reps.*, 316-323; 4 *Greenleaf's*

*Cruise*, 85. To apply these strict principles, however, to the early grants and transactions of a new country would introduce infinite confusion, and the grant of 1761 was admitted at the argument, except upon the point of uncertainty, to be valid; *Buc. Abr.*, title *Grants*, 664.

What effect, then, had it upon the previous titles and the drawings in *November*, 1760? I am of opinion that it cancelled them altogether. And so the proprietors must have thought, for although they no doubt retained their possessions under the old drawings, they formed an allotment book, 27th *October*, 1772, distinguishing the different lots and apportioning them among the grantees and others. It was stated at the argument that there are 95 names in the allotment book and only 69 in the grant, and it is apparent on the face of it that several lots had been assigned by one party to another, probably by parol, in the loose way in which such things were done at that early period.

In the drawing of 15th *November*, 1760, farm-lot 81 is put down to *John Broderick*, and there is added in a different hand and fresher ink, "Granted to *Wm. Hore*." In the allotment book it is put down in the proper column along with three others, Nos. 77, 78 and 79, each containing 158 acres, to "*Frederick Dilk Hore*, in his own right, and in right of *Wm. Hore*, *Simon Perry*, and *Samuel Bailey*," *Bailey* being the only one of the four whose name is in the grant, having drawn lot 77, as is seen in the proprietor's book, page 12. His name does not appear in the allotment book otherwise than as above, and there is no reason to suppose that he had any interest in lot 81. Supposing that lot to have ever belonged to *Wm. Hore*, of which there is no evidence, there is none of any transfer or deed from him to *Fred. D. Hore*. The title, however, of the defendant rests entirely upon the assumed right of *Fred. D. Hore*, and had there been a conveyance from him, or proceedings against him, passing title according to law, the case of the defendant would have been greatly strengthened. The sheriff's deed, however, of 15th *July*, 1768, and the subsequent conveyances up to *William Nesbitt's* deed to the *Boyd's* in 1777 are defective at almost every step, and could be of no avail, except to characterize and strengthen an adverse possession. The deed of exchange

in 1805, by which *George Morrison* transfers lot 81 to *John Walker* is not sustained by any proof of right in *Morrison*, and the devise by *John Walker*, and the deeds from *Walkers* to the defendant of said lot, although of value as showing a continued claim, are insufficient of themselves to pass title. The right of the *Walkers*, and of the defendant under them, must be held to rest on possession, and not on documentary proof. This was so held at the trial and was scarcely questioned at the argument.

The plaintiffs' documentary title has also its difficulties, but of a different class. The name of *Joseph F. DesBarres* appears in the proprietors' book for the first time in 1767, when it was voted that he should have 300 acres laid out to him in the forks of the river. In *April*, 1768, he obtained a grant of several lots containing 2000 acres in all, including farm-lots 81, 82 and 83, back lots, and lot 3 lying within the forks of *Pisaquid* river. Upon this grant the plaintiffs mainly depend. It precedes by four and a-half years the allotment of *October*, 1772, and passed the title in lot 81, if the Crown was competent to grant. But the learned Judge instructed the jury that the documentary title of the plaintiffs had not been established, because the grantees under the grant of 1761 were entitled to certain quantities of land within defined limits, and although these limits were more than enough to satisfy all the grantees, yet as they had undivided rights over the whole, the Crown could not, before allotment had been made to the grantees, grant a defined lot in severalty to Gov. *DesBarres*, and after partition the title to the several allotments would be in the allottees, and not in the Crown. I am citing the language of the charge, which announces, it will be perceived, a very important, and to me a novel principle. It amounts to this, that the Crown having granted 65 shares out of the 100 shares in the township, could grant undivided shares only of the remaining 35 until all the 65 shares had been allotted. Now it will readily be conceded that the Crown, after allotments had been made out of the 65 shares, could grant none of the lands within the allotments so made; but that the Crown should be disabled from granting any part of the 17,500 acres it still owned, comprehending 25 square miles in severalty, till the whole of the

32,500 acres was allotted, seems a very sweeping, and, as I think, an unsustainable conclusion. None of the authorities cited at the argument go so far as this, and the practice at the Crown Land office has been all the other way. It is a part of our history, evidenced by our Provincial Acts, (vol. 1, p. 130, &c.,) and by the facts that are apparent in this very township, that many of the grantees in the several townships erected in the Province never came to it, nor by themselves or others took possession of their shares, so that the Crown, if it were to wait till all the allotments were made before it could grant in severalty, was subject to a perpetual disability. There is another consideration which must not be lost sight of. The shares in these townships having passed from hand to hand by verbal contract and without deed, the purchaser having no title under the township grant, was naturally and properly desirous of having a grant of confirmation; which was not inconsistent with, but was founded on, and derived its origin and strength from the township grant. Numerous such grants, merely of confirmation, have passed in this Province, and it may be safely averred that hundreds of titles depend on them. If all such grants are void, all these titles are assailable,—a conclusion from which this Court would naturally and properly shrink. The same state of things existed in *Massachusetts*, substituting grants from the Legislature, after the declaration of independence, for grants from the Crown. Suppose that in the case of private deeds the rule of law were as it is stated in the charge, the decision in the States Courts, on account of its mischievous operation, would justify us in refusing to apply it to a grant from the Crown. Every presumption is to be raised in favor of such a grant, and the proof must be very clear to set it aside, not in *scire facias*, but in a private suit. This is not the case of a royal grant in the face of a twenty years' possession, or of a previous grant of the same premises, which are familiar instances in this Court, but a case resting on a supposition or refinement. A grant of lands by patent under the seal of the State is *prima facie* evidence that it was regularly issued, and that all things preliminary had been regularly performed and complied with; 2 *Hilyard on Real Property*, 245. In *Jackson v. Murray*, 7 Johns., 5, it is said in the head-note

that Government is never presumed to grant land twice, and where "K., who purchased in 1689 lands granted to S. by a Dutch patent in 1667, took out a patent in 1674, which included lands said to be covered by the first patent under which he held, the persons deriving title under K. were estopped to say that the location of the first grant extended so as to include any part covered by the second patent. In *Higbee v. Rice*, 5 Mass. Reps., 350, it was held that, independently of statutory provisions, a grant of land by the Legislature to several persons created a tenancy in common, and not a joint tenancy, though the words used, if a private person were the grantor, would create the latter estate. Chief Justice *Parsons* applies the above principle to township grants. "From long use," he says, "it has acquired the force of law, and a decision repugnant to it would produce infinite confusion, and affect very many titles to land in this State." The same reasoning, I think, would apply to subsidiary grants in this Province, where they are original or new grants in severalty, and *a fortiori*, where they are grants of confirmation. Now there is just reason to infer that the grant to Gov. *DesBarres* in 1768 was in whole or in part a grant of confirmation. We have already seen that 300 acres at the Forks were assigned to him in 1767, and in the allotment book he is set down as the owner in his own right, and in right of *John McKenzie* and of *George Rohn*, of five shares in the fifth division, including five farm-lots each, viz., 158 acres, and three of them at the Forks. How it was that in 1772 lot 81, which had been granted to Gov. *DesBarres* in 1768, is set down in the allotment book to *Fred. D. Hove* does not appear, and is one of the difficulties in the case.

Another difficulty arises out of the fact that in the deed of gift from Gov. *DesBarres* in 1819, lot 81 is not specifically named. That the *Misses DesBarres* claimed it under that deed as part of the 7000 acres, and of *Castle Frederick* estate, is abundantly clear from their survey of such in 1830, from their conveying it to *Trenholm* by a warranted deed in 1832, and from their conduct and declarations as proved by *Upshaw*, *Reading* and *Northup*. The Judge instructed the jury that the evidence was insufficient to bring lot 81 within the operation of Gov. *DesBarres* deed in 1819, but

I cannot help thinking that it should have been left to the jury as a question of fact. The rule is so laid down in *Greenleaf's Cruise*, 2nd ed., vol. 4, notes 586-7. Where there is no controversy as to the facts in the case, the question, what land was intended to be conveyed, is a question of law. But where any facts remain to be settled, the case goes to the jury under the direction of the Judge. The intent of the parties is to be inquired into, and, in order to ascertain it, the Court will consider their particular situation,—the circumstances attending the transaction, the state of the country and of the thing granted at the time of the grant. See also 2 *Washburn on Real Property*, 662, 669, 673, &c. A deed is to be construed with reference to the rightful, actual state of the property at the time of the execution. The parties are supposed to refer to this for a definition of the terms made use of in their deed.

It is another peculiarity of this case, distinguishing it from every other of a like kind within my remembrance, that the plan of the *Castle Frederick* estate, which was essential for showing the position of lot 81 as a part of that estate, and which I have never seen, was neither admitted at the trial nor accessible to us at the argument.

I have only further to remark that in my view the Act of 1866 does not apply, there having been no possession of the defendant bringing him within its operation, and that on the doctrine which is now well established, (9 *M. & W.*, 48; *Rev. Statutes*, chap. 134, sec. 168,) the recovery of *Walker*, in the action of ejectment against *Trenholm*, was not conclusive. *Upshaw*, the principal witness for the plaintiffs, was not called in the former case, and, at all events, a judgment in ejectment is no answer to a second action. And inasmuch as I cannot bring myself to acquiesce in the views taken by the learned Judge in his charge, which of course largely influenced and probably governed the jury in finding a verdict for the defendant, I am of opinion that there should be a new trial. To refuse it would be taken as an approval by this Court of the new doctrine as to township grants, to which the majority of the Court are opposed.

I must add a few words on a point but slightly insisted on, if it were mooted at all at the argument. My notes do

not refer to it at all, but it may have escaped my observation. The real claimant in this case associated *Trenholm's* name with his own, as has always been the practice, and is still permitted in ejectment, to cure any imperfection in his own title. Now it is said that *Trenholm's* name will not avail him, because there is an adverse possession against *Trenholm* of upwards of thirty years since the recovery in ejectment: but it has been already shown that that recovery was not conclusive of his title, and for the last twenty years the possession of the lot has been in fact abandoned. It is then argued that *Trenholm's* deed to Judge *DesBarres* passed no title in the lot on account of *Walker's* recovery and the old common law doctrine of maintenance. We had occasion to review this doctrine in 1861, in the case of *Allan v. McHeffey*, 1 Oldright, 120. A case was there cited, (11 *M. & W.*, 675,) where it was admitted that many of the older authorities on this point cannot be upheld at the present day,—that the old cases, in fact, are now exploded, and while the principle remains intact, its operation is very much restrained, and holds only where there is danger of oppression and abuse. The reason assigned by Lord *Coke*, (*Co. Lit.*, 214,) "that pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed," has little or no application to modern times, and still less to the circumstances of a new country, where the rights of landholders are perpetually invaded, and possession without authority usurped by squatters without pretence of right, and it would be hard if such possessions, however adverse, should destroy the owner's right to convey or devise his property. In this very case it is conceded that the defendant is resting on possession without title, and before giving him the benefit of the common law doctrine we are speaking of, I should prefer that its extent and its applicability to this Province should be fully inquired into. For this reason, also, I think there should be a new trial.

## CLARKE v. FULLERTON.

W. C., the master of a merchant vessel, made a voluntary gift to the plaintiff, his daughter, of a spy glass. Immediately afterward he proceeded upon a voyage and was lost at sea. Defendant obtained possession of the glass from the plaintiff, promising to return it to her, but, having been appointed administrator of W. C., of whom he was a creditor, instead of returning the glass he had it appraised and sold it. Plaintiff thereupon brought trover, to which defendant pleaded (1st) denying the conversion, (2nd) denying the property in the plaintiff, and, (3rd) alleging that the glass was the property of the deceased, of whom defendant at the time of the alleged taking and conversion was administrator, and that as such he took and retained, &c. The jury found in favor of plaintiff for \$350 damages.

*Held, per WILKINS and DMBARRIS, J.J., DODD, J. concurring and Sir W. YOUNG, C. J. and McCULLY, J. dissenting,* that plaintiff being in possession at the time of the taking had a clear right, even without title shown, to maintain the action against the defendant who was a mere wrong doer. That the defendant was not a creditor within the meaning of 13th Eliz., cap. 5; but that even had he been such, he, being administrator, could not as such creditor be permitted to impugn the gift, even if the estate were insolvent, and other creditors were proved to exist. That could only be done by the latter or some one of them acting for himself. The question of fraud in relation to a voluntary gift is, in effect, a question of fraudulent intention in the donor's breast existing at the time of the gift.

A proved creditor alone can impeach a voluntary conveyance as fraudulent against creditors, though, when it is so avoided, it is avoided for the benefit of all the creditors. The creditor must put himself in a position to complain by obtaining judgment for his debt, and showing that by the settlement he is defrauded. Where the damages awarded by the jury are excessive, but the plaintiff is entitled to recover, the Court, in the exercise of their control over the verdict, may suggest a reduction of the damages; or, where the suggestion is accepted, may order a new trial on the ground of excessive damages alone.

WILKINS, J., now, (July 26th, 1871.) delivered the judgment of the Court:—

The action is *trover* for a telescope, proved at the trial to have been the subject of a gift to the plaintiff by her father, who afterwards died intestate, and of whose estate defendant was appointed administrator. There are pleas, 1st, denying the conversion by defendant; 2nd, denying property in the plaintiff; 3rd, a special plea which I shall have to notice more particularly hereafter. At present I merely remark in regard to it that it did not justify the taking and conversion by defendant as a creditor, or as the representative of a creditor, on the ground of plaintiff's title to the chattel being founded on a voluntary gift that was fraudulent and void as against creditors of the donor, but the justification is confined to the defendant's character of administrator, and fraud is not in any respect alleged in the plea. Under the pleadings, in view of the facts, and of acknowledged principles of law governing them, there was, as we shall see, nothing for the jury to try, but the value of the telescope. The plaintiff



being in possession of it at the time of the taking had, even without title shown, a clear right to maintain the action against the defendant who was a mere wrong-doer; *Selwyn's N. P.*, 1338; *Armory v. Delamirie*, 1 Str., 505. He was not only a mere wrong-doer, but as administrator his conduct in relation to the subject of the action shows him gratuitously endeavouring to avoid, for his own personal interest, a voluntary gift which he, as the representative of the deceased donor was bound to sustain. He was not only not a creditor within the meaning of the 13th *Eliz.*, chap. 5, but even if he had been such, he being administrator could not as such creditor be permitted to impugn the gift in question, not even if the estate was insolvent and other creditors were proved to have existed. That could only be done by them, or some one of them acting for himself. These principles are too clearly established to be questioned.

It will be seen that defendant got possession of the chattel in question by a fraud, which in law is the same as if he had obtained it by force. The law would have given him as administrator no right forcibly to take possession of it, assuming it to have belonged to the estate that he represented, from the plaintiff who claimed property in it, and who had possession of it before the death of the intestate. He must have made the chattel available for the estate by asserting his representative claim to it in due course of law, or awaiting proceedings against him by creditors having that object. If plaintiff had been called on to prove her title, she did prove it, subject, of course, to impeachment in the regular way by a creditor as fraudulent under the statute of *Elizabeth*; *Winter v. Nelis*, 4 L. T., N. S., 639. In such a case as this, the case of asserted title founded on a voluntary gift from a deceased person, the course of a creditor desiring to impugn it has been established for centuries. He may sue the donee of the chattel as an executor *de son tort*, or he may sue the personal representative of the deceased suggesting a devastavit. In either case the question whether there was or was not in the gift a fraud that would avoid it for a creditor must arise as an issue to be determined. I shall have occasion to notice authorities for this view of the law. If in this very case it were a fact, (and such does not mark the case,) that

any creditors of the intestate had required of the administrator to make this telescope available for payment of his claim, the law furnished the administrator with this answer: "I represent the donor, as respects whom when living and me, in my character of his representative since his decease, the gift, even if voluntary and fraudulent, is absolutely unimpeachable; my hands are thus tied up; you must sue the donee as executor *de son tort*, or you may sue me if you think in respect of the chattel I have committed a legal devastavit." So that the state of the law was such at the time of the conversion that the creditors were under no difficulty in prosecuting their claims, and the administrator under no legal obligation to pursue the course, the harsh course, that he adopted.

Before proceeding further it is proper to consider how the defendant obtained possession of this chattel. Contemplating, no doubt, taking out administration, but before obtaining it, aware that the plaintiff was secreting the instrument, he gets possession of it from the hands of *Russell*, her custodian of it, having authorized and directed him to say to the plaintiff, in order to induce her to part with it, that the instrument would be in safe keeping in his (the defendant's) hands, and that in a short time there would be an administrator to take charge of it. How *Russell* exercised his delegated agency appears thus by the testimony of the plaintiff, which the defendant did not contradict. Plaintiff says: "*Mr. Russell* came to the house where I was and said, '*Fullerton* wants to borrow the telescope;' I objected. He said, '*Fullerton* says on the honor of a man he will give it back;' I gave it to *Russell*." Thus we have on the one hand this young woman striving to keep the instrument from the grasp of the defendant, and, on the other, the defendant endeavouring and successfully by stratagem and deceit to obtain the possession of it. Such means the law will not sanction. The Judges say in 3 *Rep.*, 78 a: "The common law does so abhor fraud and covin that all acts, as well judicial as others, which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful." In perfect keeping with this, and on this very ground, the Lord Chancellor, in *Scholefield v. Templer*, 4 DeGex. & Jones, 429, said: "I consider it to be an established principle that a per-

son cannot avail himself of what has been obtained by the fraud of another unless he not only is innocent of the fraud, but has given some valuable consideration." See also *Edmondson v. Nuttall*, 17 C. B., (N. S.) 279.

But let us now enquire what position this defendant occupies when asserting his right to contest the claim of the plaintiff to the chattel in question, arising out of a gift to her by her father since deceased, and taken out of her possession by defendant. He appears only as the personal representative of the intestate who was the donor of the chattel in question. Section 79 of the *Practice Act* requires all matters in confession and avoidance to be pleaded specially. So section 83 enacts that in all actions for wrongs independent of contract the plea "did not do what is complained of," shall operate as a denial only of the wrongful act, and no other defence than such denial shall be admissible under that plea. And then follows, "all matters in confession or avoidance shall be pleaded specially as in actions on contracts." Turning to the only special plea on the issue we will find defendant confessing the taking and retaining possession of the telescope, and alleging his right to do so on the sole and single ground, viz., "that it had been the property of *Clarke* deceased, and that defendant at the time of the alleged taking and conversion, and at the time of pleading was administrator, &c., of *Clarke*, and as such took and retained," &c. So that whether he at those times, and whether any other person was a creditor of the estate, is a subject of inquiry that is not before us under the pleading. If it were a point that we were called on to consider, it would be observable that it by no means follows, because the estate in question is insolvent, that is, that claims have been presented before the Judge of Probate against it exceeding the apparent assets, that therefore when a final decree shall be made that decree, or the judgment of any other Court, will establish the ultimate insolvency, or pronounce this defendant, or any other of the claimants, to be a creditor of the estate. It does not follow that because A B prefers a claim in the Court of Probate against the estate of a deceased person, therefore he is a creditor. Suppose on a citation issued in order to a final settlement of the estate in question, this plaintiff shall appear as next of kin and contest

the defendant's claim or that of any other alleged creditor. It is quite possible—it is a possibility which this Court is bound to regard—that all the existing claims may be cut down entirely, or so reduced as that no necessity may exist for depriving the next of kin, being this defendant, of this chattel to which she is clearly entitled, if all creditors be paid or waive their claims. Suppose as the judicial result of her opposition that this defendant's claim be cut down, what proof have we that any other creditor desires to take from the plaintiff this cherished testimonial of her father's brave and successful efforts to save human life, which the Government of his country recognized and honored, which, estimated as the defendant estimated it, and sold it, would give to each alleged creditor just one cent and a-half only for every dollar of the alleged indebtedness. When we come to consider the statute of 13th *Eliz.*, chap. 5, we perceive how obvious is the *rationale* of that construction of it which was given shortly after it passed, viz., that a voluntary gift could be avoided if fraudulent by a creditor only, including, of course, in that designation every one legally representing him or standing in an analogous position, *e. g.*, his personal representative, or the assignee of a bankrupt debtor or of an insolvent debtor. From a right, however, to assert the annulling operation of that statute were then expressly excluded, and have ever since to this hour been excluded, (save where the Legislature has expressly interposed and modified the rule,) by unvarying judicial construction, the donor of the gift in question and his personal representative. A judgment creditor might, as already intimated, if he elected to do so, charge this defendant as administrator, suing him for the debt and suggesting a *devastavit*. That is precisely what was done in *Shears v. Rogers*, 3 B. & Ad., 362. In the case before us, in most striking contrast to *Shears v. Rogers*, there is no one fact inferential of fraud, and therefore nothing that could have warranted a jury in finding fraud to have marked the gift, if fraud had been pleaded and submitted to them. I say advisedly there was no fact proved as existing at the time of the gift or subsequent to that time, from which fraud could have been inferred. *Hovenden* says, (p. 76,) in his learned treatise: "The 13th of *Elizabeth* does not make void all

voluntary conveyances or settlements as against creditors, but merely makes fraudulent settlements void against their claims. Fraud in such cases may, of course, be inferred from facts proved, but it cannot be conjectured in the absence of facts." But it seems to be forgotten that fraud in relation to this gift is not pleaded; it cannot, therefore, be a subject of inquiry. What says our *Practice Act*, sec. 80? It says: "Where a defendant intends to set up fraud as a defence to the declaration, or a plaintiff to rely on fraud in answer to a plea of the defendant, it must be pleaded." This defendant insisted at the trial upon what, if true, he knew before the trial, and when he pleaded that the telescope was not plaintiff's because she claimed property in it under a gift fraudulent by virtue of the statute. Of course such matter of defence could not be entertained without violation of a statutable rule of pleading. It may be remarked, however, that the question of fraud in relation to a gift is in effect a question of fraudulent intention in the donor's breast, existing at the time of the gift. Now there is no proof that this donor at the time of this gift believed himself to be in insolvent or failing circumstances. Contrast the case with that of the donor in *Shears v. Rogers*. This intestate may have taken with him on his last voyage for commercial purposes money or securities more than sufficient to pay every debt that he owed. Even a judgment creditor, having an interest in showing the contrary, would have, before he could annul the gift, to show some facts, (not mere present presumable insolvency of his estate,) as they were shown in *Shears v. Rogers*, from which fraud could be presumed. Before passing from that case I must remark on words expressed by *Littledale*,—that most eminent Judge—in his judgment therein, which are sufficient in effect, *per se* to decide this case. He said "the assignment was void as soon as the creditors claimed to treat it as such, though not until then. An unvarying stream of authorities from the time of Lord *Thurlow* to the present day shows, as the reason of the thing shows, that a proved creditor alone can impeach a voluntary conveyance as fraudulent against creditors though when it is so avoided, it is avoided of course for the benefit of all the creditors." Lord *Thurlow* said in *Coleman v. Croker*, 1 Ves. Jr., 161: "As to the fraud, there must be

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some creditor to complain of that, and he must put himself in a situation to complain by getting judgment for his debt, and showing that by the settlement he is defrauded." To the same effect is *Hovenden*, p. 75; he says, (adopting the words of *Sir Wm. Grant*): "To induce a Court of Equity to set aside a settlement as being fraudulent, under the 13th of *Elizabeth*, the complaint must be made by a creditor who has put himself into a situation entitling him to apply for the aid of the Court by having obtained a judgment for his debt, and showing that by the settlement he is defrauded of the fruits of his judgment, for a voluntary settlement is void under the statute only against creditors. To the extent to which it may be necessary to deal with the estate settled for their satisfaction the settlement is null, to every other purpose it is good; *Hilyard on Sales*, 256. So essential is the judgment, that to show a judgment by confession is not enough. Thus in *Sanderson v. ———*, *Holt's Reps.*, 327, goods having been taken in execution which were in possession of the plaintiff under a bill of sale from G., the plaintiff brought the action, and the defendant insisted that the bill of sale was fraudulent against him, he being a creditor by judgment. It was said by Chief Justice *Holt* that "if the judgment was upon a point tried, the consideration for it need not be proved, but it should be intended good; but if it were a judgment by confession it ought to be proved to have been for a just debt, otherwise it should not overthrow the sale even though the sale were fraudulent, for it is good against all but creditors for a just debt *bona fide*." In *New York State* it is only by force of an express statute that executors or administrators can impeach a voluntary gift on behalf and for the benefit of creditors; *Willard's Equity*, 240. Though I have found a case not distinguishable from this, and of the highest authority, I might content myself with citing the following extracts from a learned treatise of acknowledged reputation on the very subject of our inquiry, which by permission was dedicated to Lord *Eldon* by its author *Mr. Roberts*. He says, (p. 422): "The statute 13th *Eliz.* does not enlarge the natural jurisdiction of any Court by furnishing any new remedies. It merely avoids the voluntary act, leaving the rest to the consequences and remedies of the law. Where lands or

chattels are voluntarily and fraudulently transferred, the statute avoids the transfer as against creditors who have a right to regard the transfer as unaltered, and consequently still subject to their executions, but the statute helps these no further than by allowing them to avail themselves of this construction by the judicial remedies which flow from their rights." Again *Mr. Roberts* says at p. 592: "Whenever a man makes a fraudulent gift of his goods and chattels and dies indebted, the rule upon the 13th *Eliz.*, chap. 5, has always been to construe the gift as utterly void against all his creditors, and the debtor to have died in full possession with respect to these claims, so that the effects are just as much assets in the hands of the personal representative as to creditors as if no such attempt to alien them had been made." In this passage the emphatic words are "fraudulent gift," "all his creditors," "their claims," and "as to creditors." It was referred to by the Court in *Shears v. Rogers* above noticed, which illustrates the meaning of it most clearly thus. The deed of assignment being void, the lease (which was in the possession of testator at his death) remained the property of the testator, and was clearly assets in the hands of the defendant. The authorities show that wherever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claims of creditors, and the goods are assets in the hands of his executor. It is impossible to say the lease was not assets, for the defendant (the executor) had it in his possession, and he delivered the assignment to the husband of one of the daughters in law in violation of, not in pursuance of, the alleged trust, for that required that he should keep it. That was a devastavit." *Mr. Roberts* adds, (p. 641): "Voluntary conveyances were always binding upon the party and his personal representatives." The following case (*Harves v. Leader*, Cro. Jac., 270.) relied on by the Court in the celebrated case of *Edwards v. Harden*, 2 T. R., 597, runs on all fours with the case under our consideration. It has, since it was decided, been recognized by great Judges, and has in short passed into a principle in the interpretation of the 13th of *Elizabeth*. It is thus extracted by *Roberts*, p. 642: "A, dying intestate, after having granted to B (by the grant after-

wards impeached) all his goods mentioned in a schedule, B (note this) demanded the goods of the administrator, who refused to deliver them, whereupon B brought his action against the administrator. The defendant administrator pleaded the statute, and that the intestate was indebted to divers persons in several sums, (specifying persons and sums) and being so indebted made the deed, (being a grant of the goods) which was covinous between the intestate and the plaintiff to deceive his creditors. Plaintiff replies defendant had assets sufficient, and deed on consideration, whereupon issue joined. *Cook, J.*, refused to try the cause, because the issue was not well joined, and a *re-pleader* ordered, upon which the defendant pleaded as before and the plaintiff demurred."

Before noticing the judgment let us observe what that demurrer admitted. It admitted (to refer to the case before the Court) every fact relied on by *Fullerton* under his general plea in trover at the suit of *Clarke*, viz., that the defendant was administrator to the deceased donor of the chattel in question; that the intestate was indebted to certain creditors, and that being so indebted he conveyed the subject of the action by a covinous deed between the intestate and the plaintiff claiming under the deed, to deceive and defraud creditors. Nevertheless judgment was given for the plaintiff because, among other reasons shown for the demurrer, it was insisted that perhaps the creditors named will never sue for their debts, and by that means the defendant will justify the retaining of the goods forever, which will be inconvenient; but if defendant had pleaded a recovery by any of the creditors, and those goods of the value to be taken in execution, that had been a good plea. Secondly, that the defendant was not a person enabled by the statute, 13th *Eliz.*, chap. 5, to plead as he had done, for the statute made the deed void as against the creditors, but not against the party himself, his executors or administrators, and against them it remained a good deed. The case was recognized by Lord *Hardwick* in *Underwood v. Hithcock*, 1 *Ves. Sr.*, 279, and in subsequent cases without number, and repudiates the pretence of an administrator coming forward as a volunteer for creditors to impeach a conveyance as fraudulent and void under the



statute. So also the Court decided in *Parkman's* case (6 Rep. 18). To the same effect is *Hobson v. Staneer* 9 Mod., 80; see also *Hilyard on Sales*, 353.

As respects the damages, we must bear in mind that the tricky act of the defendant prevented such an inspection of the instrument by competent witnesses as was necessary to enable the jury to determine its real value. The defendant, moreover, sold it not at the auction which he had advertized, but at a private sale, secret, as regards plaintiff, and therefore without an opportunity afforded her of competition for it. All these circumstances may be supposed to have had, and within certain limits ought to have had, weight with the jury. Exemplary damages in actions for tort, where fraud or wilful wrong has marked the defendant's conduct, is a principle recognized by the law; *Merest v. Harvey*, 5 Taunt., 442; *Wood v. Morewood*, 3 Q. B., 440; *Emblen v. Myers*, 6 H. & N., 54. In *Armory v. Delamaria*, 1 Str. 505, where trover was brought for a jewel, it being proved what a jewel of the first water was worth, the Chief Justice directed the jury that unless defendant produced the jewel, and showed it not to be of the first water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages. Lord Mansfield, in *Fisher v. Prince*, 3 Burr., 1363, recognized the principle that the damages in trover may be enhanced above the real value of the chattel by attending circumstances or by a tort accompanying the case. It has been held that where a wrong has been committed, the wrong-doer must suffer for the impossibility of ascertaining the amount of damage; *Duke of Leeds v. Amherst*, 20 Beav., 239. Where a landlord caused considerable injury to the crops of a tenant by felling and removing and selling timber without applying for leave to enter, and the jury assessed the damages at £300, the Court refused to interfere, although the net value of the entire crops did not exceed £200; *Williams v. Currie*, 1 C. B., 841. The amount of the verdict probably far exceeds what the instrument cost in London, with the difference of exchange, freight, and all other charges on it superadded, but we have no means of ascertaining what that original cost was, and we have no evidence from any source of the worth of the telescope. We cannot accept as a standard of value what it

brought at the private sale, and the appraisement returned in to the Probate office is very far from a satisfactory test when applied to such an instrument as this. The mere *pretium affectionis*, or ideal estimate of the plaintiff or of her father, having relation to the circumstance which induced the gift of the instrument to the latter by the *British* Government is too vague and uncertain to form our measure of value. This principle ought not, however, in my opinion, to be entirely lost sight of, if we are to adjust the damages in our discretion, in view of the circumstances under which this plaintiff was deprived of the possession. Undoubtedly we have power to say that a new trial will be granted unless the plaintiff consents to a certain prescribed reduction of the sum named in the verdict. (See *Ch. Arch.*, 12th ed., 1524, and authorities there cited.) I have not, however, found an *English* case where in trover a strict measure of damages exemplary or vindictive has been adopted. There are *English* cases in trespass, as we have seen, where the principle of such damages—principle acted on by the Judge in putting the case to the jury—has been recognized and fully approved. If the instrument called at the trial, and described in the pleadings as a telescope was, what it probably was, a portable ship's spy-glass of the most expensive kind, still I should not be satisfied to let the defendant remain subject to the damages found, for, in the case supposed, I cannot conceive that £20 sterling would not equal the true value. On the whole, I am of opinion that in the exercise of our control over the verdict, we should suggest a reduction of damages from the sum found so that the amount should stand at \$100; and that a new trial on the ground of excessive damages alone should be ordered, if the suggestion be declined by the plaintiff.

DESBARRES, J.—This was an action of trover brought against the defendant for wrongfully converting a telescope to his own use which the plaintiff claimed as a gift from her father, the late Captain *William Clarke*, to whom it was presented by the *British* Government as an acknowledgment of his meritorious conduct while in command of the brigantine *Janet Kidston* of *Windsor, N. S.*, in saving the lives of the master and crew of a ship wrecked in *December, 1861*.

To this suit the defendant pleaded, 1st, a denial of the conversion of the telescope to his own use; 2ndly, a denial of its being the property of the plaintiff; and, 3rdly, that it was the property of *William Clarke*, deceased, and that the defendant was, at the time of the alleged taking and conversion of the telescope, the administrator of the goods and chattels, &c., of said *William Clarke*, and as such administrator took and obtained the possession of the property, as he had a right to do. The case was tried before Mr. Justice *Wilkins* at *Kentville*, and there was a general verdict for the plaintiff upon all the issues raised upon the defendant's pleas for \$350. A rule was granted by the learned Judge for setting aside the verdict, upon the grounds of its being against law and evidence, and for misdirection, at the argument of which, at the last term, the grounds urged in support of it by defendant's counsel were, 1st, that there was no absolute gift of the telescope to the plaintiff by her father; 2ndly, that if any such gift was made, it was void as against the creditors of the donor; 3rdly, that there was no legal demand of the telescope made by the plaintiff from the defendant; and, 4thly, that the defendant, being at the time of the taking and conversion, administrator of the estate of *William Clarke*, the donor, he, the defendant, had a right to retain the possession of the telescope for payment of his bills.

It is a settled rule of law that delivery is essential to the validity of a parol gift, of a chattel, or chose in action, and that gifts *inter vivos* can have no reference to the future, but must go into immediate and absolute effect. In *Irons v. Smallpiece*, 2 B. & Ald., 551, *Abbott, C. J.*, said: "That by the law of *England*, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee, and he remarked that a verbal gift differs from a *donatio mortis causa* only in this respect, that the latter is subject to a condition, that if the donor live the thing shall be restored to him." In *Winter v. Winter*, 1 Best & Smith, 997, decided in 1861, it was held that actual delivery was not necessary where a change of ownership could be shown. That was an action of trover and detinue brought by the plaintiff, as executor of his father, against his brother, for a barge which the plaintiff claimed as

the property of his deceased father, and to which the defendant set up a title by gift to him by the father while he had the charge and possession of the barge. *Crompton, J.* there says: "Actual delivery of the chattel is not necessary in a gift *inter vivos*. In the case of *donatio mortis causa*, there is a reason for requiring some formal act. It is sufficient to complete a gift *inter vivos* that the conduct of the parties shall shew that the ownership of the chattel has been changed." In the present case there was proof of a gift and an actual delivery to the plaintiff by her father, of the telescope in question, and proof of an acceptance of it from the hands of her father, and a possession of it as her own for a period of between two and three months. At the end of that time a *Mr. Russell* came to the plaintiff as the friend and agent of the defendant, the father of the plaintiff being then supposed to be lost at sea, and requested her to lend the telescope to the defendant, saying that "on the honor of a man" the defendant would return it to her. Trusting in this assurance the defendant lent the defendant this instrument, who, instead of returning it, as she supposed he would, sold it for a small sum (\$35) on obtaining administration of her father's estate, contending that as there were outstanding debts against the donor, the gift of the telescope by him to the plaintiff was void, as against the creditors of the estate for whose benefit it had been sold. Considering the small sum obtained for this instrument, and the fact of its not having been purchased with money to which the creditors ever had any claim, and that it had been presented to the donor as a testimonial of his praiseworthy conduct. I cannot help thinking it would have been but an act of liberality to be expected from most men, if it had been allowed to remain in the hands of the donee, who alone could value it as her father did, not for its intrinsic worth, but for the inscription engraved upon it, and the source from whence it came. The means used by the defendant to get possession of the instrument from an unsuspecting woman, under a promise to return it, which it would seem was never intended to be fulfilled, were, if not reprehensible, to say the least ungenerous, and that perhaps may in some measure account for the largeness of the damages found by the jury.

As to the first point taken as a ground for setting aside the verdict in the case, I think the evidence of the plaintiff herself, which is uncontradicted, and strengthened to some extent by that of *William Smith*, who speaks of the donors previously declared intention to give, is conclusive to shew that there was an absolute gift by Captain *Clarke* to the plaintiff, of the telescope, which, accompanied as it was by a delivery, was sufficient to transfer to the plaintiff the right of property in the instrument, if the donor was, at the time, in a condition to make such transfer.

Passing over the second point, which is comprehended in the fourth, I may say, as to the third, that I am of opinion the requests made by the plaintiff, or rather the conversations which she had with the defendant on two occasions, expressing her desire that he would return the instrument, cannot be regarded as sufficient evidence of demand, particularly as there is a variance between the statement of the plaintiff and that of the defendant on that subject, who states that the plaintiff never personally applied to him for the instrument after it came into his possession; but I think the demand made upon the defendant by *Mr. Woodworth*, acting as the agent and attorney of the plaintiff, and the refusal or neglect on the part of the defendant to deliver up the instrument was sufficient evidence of its conversion to enable the plaintiff to maintain the present action. If there could be any doubt upon the subject, the proof produced on the part of the defence of an actual sale of the instrument by the defendant, would surely be an answer to this objection.

The second and fourth point, forming, as I have already observed, one and the same and the real and substantial subject for consideration is, whether the gift, assuming it to have been formally and rightly made with the intention of transferring the right of property in the telescope to the defendant was void under the statute of 13th *Eliz.*, chap. 5, as against the creditors of the donor. There is no doubt that the doctrine generally laid down in the cases is that a gift or voluntary settlement made by a person indebted at the time, is to be presumed fraudulent as against creditors, upon the principle that every man must be just before he is generous; in other words that he must pay his debts before he ventures

to give away his property; but it may well be doubted whether the rule is so inflexible that a man possessing real and personal property of considerable value, as Captain *Clarke* did, and believing, as we may presume he did, that although indebted he had the means of paying all his just debts, cannot make to a near relative a gift of such a chattel as that sued for, without the danger of its being swept away by the iron grasp of a creditor of the donor, claiming it on the ground of its being required for the payment of his debt. If it be so, the verdict must be set aside, but the strong impression on my mind is that the rule is not so stringent. Lord *Mansfield* in *Cudogan v. Kennitt*, Cowp., 432, says: "the statute of 13th *Eliz.*, chap. 5, which relates to frauds against creditors, directs that no act whatever, done to defraud a creditor or creditors, shall be of any effect against such creditor or creditors. But then such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore the statute does not militate against any transaction, *bona fide*, and where there is no imagination of fraud, and so he says is the common law."

Speaking of the statute of 27 *Eliz.*, chap. 4, he says: "A fair, voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question therefore, in every case is whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defraud creditors." Now there is nothing in the circumstances of this case to warrant the inference that in presenting the telescope to his daughter, Captain *Clarke* ever contemplated fraud upon, or that he for a moment supposed his act would or could by any possibility, have the effect of defrauding or defeating his creditors out of any debt or debts due them. It is not pretended on the part of the defendant that the donor had it in his mind to perpetrate a fraud, the contention is that as he was indebted when he made the gift, such gift must be presumed to be fraudulent in respect to such debts. If the donor had conveyed all his real estate to his daughter, or all his interest in the vessel, of which it appears from the inventory of his property he was part owner. there would have been

good ground for such a presumption; but I do not think the gift of a chattel like this, valued only at \$30, which was not intended to pass to his creditors, but to be possessed only by the donor, Captain *Clarke*, or some member of his family, can or ought to be presumed to be fraudulent within the statute. The question of fraud or not, according to the doctrine laid down by Lord *Mansfield* in *Cadogan v. Kennett*, is open in all cases where a man is indebted, as a matter of fact, and the law does not absolutely pronounce that the indebtedment, *per se*, makes the settlement fraudulent. His Lordship held the same doctrine in *Doe v. Routledge*, Cowp. R., 708-9-10. Suppose the gift, instead of a telescope, had been a gold or silver medal, presented to the donor for gallant conduct in the field, and he in delivering it to his daughter as a gift when about to proceed to sea, had imposed upon her the same injunction as was imposed in this case, "never part with it unless you are starving," would such a gift have been pronounced fraudulent as against the creditors of the donor. I doubt, very much, if any jury could be found, on the question of fraud or no fraud being submitted to them, who would arrive at such a conclusion, and the jury in the present case, in finding a verdict for the plaintiff, as the donee of the telescope, perhaps did nothing more than any other jury empannelled to try the cause would do under the circumstances. In *Jones v. Boutler*, 1 Cox. 288, 289, Lord Chief Baron *Skinner* said: "There is no mention in the Act (13 *Eliz.*, chap. 5,) of voluntary conveyances, and the question has always been whether, in the transaction there has been fraud or covin. Here were creditors at the time, and this has been said to have always been a badge of fraud. It is true, he says, that this circumstance is always strong evidence of fraud, but if there are other circumstances in this case, that alone will not be sufficient." Again, "where a family settlement is conducted with fairness and propriety, though the consideration strictly considered does not extend to all, yet the Court revolts at the idea of its being void" when the gift or settlement is *bona fide*; it would seem then that the mere fact of indebtedment at the time is not, of itself, held enough, according to these cases, to make it void. That of *Townsend v. Windham*, 2 Vesey, 1, is not in unison with the foregoing

cases. Thus Lord *Hardwick* said he knew of no case on the statute of 13 *Eliz.*, where a man indebted at the time made a voluntary conveyance to a child without consideration, and died indebted, that the property conveyed would not be considered as part of his estate. Judge *Story* in note 1 to sec. 360, 1 *Story's Eq. Juris*, 6th Ed., speaking of that case says, "the language of Lord *Hardwick*, though so very general, ought not, on that very account, to have more than a general truth ascribed to it when the indebtedment is of a nature and extent that makes it presumptive of *fraud*, or the conveyance is a direct and immediate interference with the rights of creditors." That case can hardly be said to be applicable to such a case as this, there the conveyance was of land clearly affecting the rights of creditors, here it is a gift of an article too insignificant in value to have any such effect. In section 362 of the same book it is said "the doctrine established in the Supreme Court of the *United States* is, that a voluntary conveyance made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary. It must be shown to have been fraudulent or made with a view to future debts. And on the other hand, the mere fact of indebtedment at the time does not *per se* constitute a substantial ground to avoid a voluntary conveyance for fraud, even in regard to prior creditors. The question whether it is fraudulent or not, is to be ascertained not from the mere fact of indebtedment at the time alone, but from all the circumstances of the case. And if the circumstances do not establish fraud, then the voluntary conveyance is deemed to be above all exception. The want of a valuable consideration may be a badge of fraud, but it is only presumptive and conclusive evidence of it and may be met and rebutted on the other side." 11 *Wheaton's Reps.* 199, 12 *John's*, 536, 554 to 557, *Ambler's Reps.* 597, 598, The doctrine of the Supreme Court of the *United States* seems to be in harmony with that held by Lord *Mansfield* in *Cadogan v. Kennett*, and *Doe v. Routledge*, see also *Lush v. Wilkinson*, 5 *Vesey*, 384, *Sagitary v. Hide*, 2 *Vernon*, 44. In *Townsend v. Westacott*, 2 *Beavan*, 340, 345, Lord *Langdale* said, "there has been a little exaggeration in the argument on both sides as to the principle



on which the Court acts in such cases as these ; on one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of fraudulent intention as to induce the Court to set aside a voluntary conveyance and oblige the Court to do so under the statute of *Eliz.* I cannot think the real and just construction of the statute warrants the proposition, because there is scarcely any man who can avoid being indebted to some amount ; he may intend to pay every debt as soon as it is contracted, and constantly use his best endeavors to have ample means to do so, and yet may be frequently, if not always indebted in some small sum ; there may be a withholding of claims contrary to his intention, by which he is kept indebted in spite of himself ; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand it has been said that something amounting to insolvency must be proved to set aside a voluntary conveyance ; this too is inconsistent with the principle of the act and with the judgments of the most eminent Judges."

In *Gale v. Williamson*, 8 M. & W., 405, it was held that a voluntary deed made in consideration of love and affection is not necessarily void as against the creditors of the grantor upon the common law or the statute of *Elizabeth*, but that it must be shown from the actual circumstances that the deed was fraudulent and necessarily tended to delay or defeat creditors, Lord *Abinger*, C. B., said : A deed made in consideration only of natural love and affection is not necessarily void, though it may be made so by evidence." *Alderson*, B. in the same case said, "the rule of law is that a deed made merely in consideration of natural love and affection, *prima facie*, imports fraud ; that alone shows that it is not conclusively but only presumptively fraudulent. It follows, therefore, that evidence may be adduced to show that no fraud was in fact intended." *Rolfe*, B., "it is a mistake to suppose that the statute makes void all voluntary deeds. All that it says is that a practice of making covinous and fraudulent deeds had prevailed, and therefore that all settlements, gifts, &c., of any lands, goods and chattels, as against the persons whose actions, debts, &c., by such covinous and fraudulent devices and practices shall be disturbed, hindered, delayed or

defrauded, shall be void. The courts, in construing the statute, have held it to include deeds made without consideration as being *prima facie* fraudulent, because necessarily tending to delay creditors. But the question in each case is whether the deed is fraudulent or not, and to rebut the presumption of fraud the party is surely at liberty to give in evidence, all the circumstances of the transaction, not to contradict the consideration stated in the deed, but to take it out of the operation of the statute."

It was arranged by the Counsel of the parties at the trial that the papers produced from the Probate Office should be considered as proof of the insolvency of the estate of *Clarke*, but assuming the estate of the intestate to have been insolvent, the question arises whether the defendant, as the administrator, can, in the language of his third plea, legally take and retain the telescope from the plaintiff, the donee of the intestate. The case of *Hawes v. Leader*, Cro. James, 270, is an authority to show that he cannot. That was an action of debt against the defendant as administrator of one *Cookson*, in which it appeared that the intestate had granted and conveyed his goods, &c., to the plaintiff, with a covenant that he or his administrators should safely deliver them to the plaintiff on his demand. The plaintiff demanded the goods from the administrator, who could not deliver them. The action was then brought and to it the defendant pleaded the statute of 13 *Eliz.*, chap. 5, of fraudulent deeds and gifts, to this the plaintiff demurred, assigning the following, among other grounds of demurrer, viz.: "that the defendant was not such a person as was enabled by the statute of 13 *Eliz.* to plead that plea. For the statutes make the deed void as against the creditors but not as against the party himself, his executors or administrators, for against them it remained a good deed of gift, and judgment was given for the plaintiff."

In *Hovenlens Treatise on Fraud*, 2nd vol., p. 75, it is said "that to induce a Court of Equity to set aside a settlement as being fraudulent under the 13 *Eliz.*, the complaint must be made by a creditor who has put himself into a situation entitling him to apply for the aid of the Court, by having obtained judgment for his debt, and shewing that by the settlement he is defrauded of the fruits of his judgment." See

*Coleman v. Croker*, 1 Vesey, Jr., 160, which sustains the doctrine laid down in *Hovenden on Frauds*, which, if sound, shows that the parties claiming as creditors of the estate of the intestate, not being judgment creditors, are not in a situation to complain of being defrauded by the gift of the intestate to the plaintiff.

After the best consideration I have been able to give to this case, I have arrived at the conclusion that the verdict ought not to be disturbed, provided the plaintiff will consent to make a reasonable reduction from the damages which, looking at the evidence, are doubtless too large, but if he will not consent to such reduction, then it appears to me there ought to be a new trial.

DODD, J., concurred.

SIR W. YOUNG, C. J.—There being a difference of opinion in this case, and judgments that enter into all the facts having been already prepared, I shall content myself with stating, shortly, the conclusions to which I have come. I assume, though a good deal is to be said on that point, that Captain *Clarke* gave the telescope to his daughter, and intended her to keep it as her own whether he returned to the Province or no. I assume, also, though this the defendant denies, that he obtained possession of the telescope by means that were not altogether honorable. The jury must have taken both these facts as proved, and, if proved, they would, naturally, incline both Court and jury to sustain the verdict. For my own part I think it a defect in the law, that an article, given as this was, by a government for gallant service, should be considered as an ordinary chattel, and sold for debt. It is not an heir-loom, but carries more honor with it than many aristocratic heir-looms do. In the distribution of an intestate estate our Legislature has declared (*Rev. Stat.*, fol. 188-9.) certain articles exempt from the claims of creditors, extending somewhat the law of *Massachusetts*, (*Digest of 1856*, fol. 429.) but have not gone so far as the *Revised Statutes of New York*, founded on the Act of 1824, which covers all the articles in our statute, and exempt, also the family Bible, family pictures, the school books used in the family, and such other

books, not exceeding in value \$50, as form part of the family library. There are other exemptions which I should not be sorry to see introduced here, and, in this maritime province, I would add all such public gifts as our sailors not unfrequently earn from their own and foreign governments as the rewards of generous acts of humanity and skill.

It will be perceived, then, that my sympathies, if a Judge has a right to indulge in such feelings, are with the plaintiff in this suit, whether the value of this telescope is \$30, as appraised, or \$35, as sold, or \$350, as it has been computed by the jury. I think that the defendant, both as administrator and as principal creditor, would have done better to have left it in the possession of the plaintiff, but he has not done so, and we are bound to administer to him the law as we find it. There is no doubt, then, as the law stands, that this telescope was subject to the debts of the intestate, if he had not legally parted with it. It is admitted by both parties in the minutes that *Clarke's* estate was insolvent, and the gift having immediately preceded the voyage on which he perished, that insolvency must be taken to have existed at the time of the gift. There is not a particle of evidence to the contrary. The inquiry, therefore, as it seems to me, narrows itself into the legality of the gift. If fraudulent as against creditors, I find no *English* authority denying that the property of the chattel rests in the executor or the administrator. "The general doctrine," says Judge *Story*, 3 *Mason*, 388, "is that a conveyance in fraud of the law binds parties and privies, and cannot be acted upon, so far as it respects them, as a nullity. But where *bona fide* creditors come in, who are neither parties nor privies, I cannot conceive on what principle the executor or administrator, who represents, it is true, the testator or intestate, but is bound, also, to protect the creditors, shall not be at liberty, on their behalf, and his own, if a creditor, to attack a fraudulent conveyance. A voluntary conveyance is not binding on the creditors of the grantor, if he become a bankrupt, for the assignees may impeach transactions which the bankrupt could not; *Anderson v. Maltby*, 2 *Ves. Jr.*, 255. And if an assignee can do this, why not an administrator. It would seem, from the case of *Colman v. Croker*, 1 *Ves. Jr.*, 160, that a creditor seeking relief in equity, must put himself

in a situation to complain by getting judgment for his debt. This proceeds either on the principle in *Mitford's Pleadings in Chancery*, 120, that, to procure relief in equity, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a good title; or upon the reason in *Story's Equity Jurisprudence*, section 375, citing the above case from 1 Ves. Jr., why voluntary conveyances of lands cannot be set aside except by creditors who have obtained judgments before the death of the party; for, until that time, the debts constitute no lien on the land. Neither of these technical reasons have any bearing on the case of an administrator, defending his title to the assets of the intestate which have come into his hands. In *Bethell v. Stanhope*, Cro. Eliz., 810, decided a few years after the passing of the 13th Eliz., it was found that one *Vaughan*, of whom the plaintiff was executor, was possessed of divers goods of the value of £250, and, by covin, to defraud his creditors, made a gift of his goods to his daughter, with a condition that, upon payment of twenty shillings, it should be void, and died. The defendant inter-meddled with the goods, and, afterwards, the daughter, by this gift, took the goods, and after that administration of the goods of *Vaughan* was committed to the defendant, and it was adjudged that the goods should be assets in his hands, and, being chargeable with them as executor *de son tort*, the plaintiff had judgment. The authorities show, said Lord *Tenterden*, that when, even, a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claims of creditors, and the goods are assets in the hands of his executors; 3 B. & Ad., 368. The same rule is laid down in *Williams on Executors*, 1518.

Now there is no evidence, and no reason to suppose, that the gift of this telescope was made with any fraudulent intent as respected the creditors of *Clarke*, or any purpose of hindering or delaying them. All that can be said is that it diminished, to a small extent, the fund out of which they are now to be paid, and the question is, does the law, therefore, avoid the gift? It was so contended, of course, at the argument, and the recent case of *Freeman v. Pope* was mainly relied on. I find this reported, first of all, in Vice Chancellor

*James' Court*, 21 *L. J. Reps.*; (N. S.) 316, and then, upon appeal, before the Lords Justices, 23 *L. J. Reps.*, (N. S.) 208, affirming the Vice Chancellor's decision, but upon a different ground. Both, however, were agreed that the voluntary settlement they set aside was innocently made. It was a settlement by a clergyman in favor of his god-daughter, made several years before, and when there was no pretence for supposing that he was in embarrassed circumstances, though he owed some amounts at the date of it, which, with several others, were unpaid at the time of his death. "Were the case," said the Vice Chancellor, and this so lately as *December*, 1869, "absolutely free from authority, I should have thought that the question I had to put to myself under the statute was, in the words of the statute, (13th *Eliz.*, chap. 5,) whether there was actually any intention, by the settlor, on the part of the settlor to defeat, hinder or delay his creditors. If I were a special jurymen to whom such a question were put by a Judge, I should upon the facts of this case, come to a conclusion that this gentleman had no such intention whatever. I am satisfied that he had not any idea whatever of defrauding or cheating his creditors by making that settlement." On which the Lord Chancellor *Hatherley* remarks that the Vice Chancellor was mistaken in supposing that it would be even left to him as a special jurymen, to find *simpliciter* whether the intent of the settlor was to defeat, hinder or delay his creditors, without a direction from the Judge, that, if the necessary effect of the instrument, was to defeat, hinder or delay the creditors, that necessary effect was to be considered as evidencing the intent. And, in a subsequent passage, he said it was enough if the instrument (or gift) subtracted any part of the funds necessary for paying the creditors of the donor. "I am quite willing to say," he adds, "that there was not the slightest immoral intention on his part, in the sense deliberately depriving his creditors of that fund to which they were entitled. On the other hand, the only conclusion we can come to is this, that he did an act which, in point of fact, withdrew from them that fund which they were entitled to, and dealt with it by way of bounty."

This very important decision has, thus, established two principles which it will be our duty, hereafter, to recognize in

this Court. First, that the intent of the donor is not the matter of inquiry, but the effect of the gift upon the rights of creditors, and, second, that if there be a creditor subsequent to the deed or gift, and there be, also, an unpaid creditor prior to the deed, the subsequent creditor has exactly the same right as the prior creditor to have the deed or gift set aside. This last position is derived from the judgment of Vice Chancellor Kindersley in *Jenkin v. Vaughan*, 3 Drew, 519, cited with approval in *Freeman v. Pope*. The dictum of Lord Chancellor Westbury in *Spuett v. Williams*, 11 L. T. R., (N. S.) 614, "that it is immaterial whether the debtor or settlor was, or was not, solvent, after making the settlement," is liable to question. But upon the first of the above positions, now for the first time authoritatively declared to be the law, I am forced to the conclusion, though with reluctance, that the gift of this telescope cannot be upheld, and that there should be a new trial. I may add that, in any event, we must have required the plaintiff to reduce the damages if she were to retain her verdict.

McCULLY, J.—This was an action of trover tried at *Kentville*, in *October*, 1869, a verdict being found for plaintiff. A rule *nisi* to set the same aside and for a new trial was argued before this Court at the last Michaelmas term. The action was brought to recover the value of a telescope alleged to have been converted by the defendant to his own use. For the purpose of this decision I need not set forth the nature of the pleas. They are, I think, confessedly, such as enable the defendant, in my view of the case, to avail himself of the defence he has put in evidence. The facts of the case, as appears by the minutes of the presiding Judge, were substantially as follows: One *William Clarke*, deceased, father of plaintiff, had in the year 1862 been presented by the *British Government* with the telescope (a mariner's spy-glass) for meritorious services in saving the crew of a wrecked vessel. In *June*, 1856, after having been at his home boarding out, he commenced keeping house, which was done for him by plaintiff, his daughter, until he again went to sea. He sailed out of *Halifax*, it would seem, in the early part of the year 1867, and was never after heard of and is supposed to have

perished at sea. The plaintiff, the principal witness, herself says, "He gave the telescope to me the day before he left,—he was asked if he meant to take it to sea, he replied, 'No, it belongs to *Mary Jane*'" (plaintiff). This was in presence of a *Mr. Steward*. This *Mr. Steward* is not called to corroborate, nor is any reason given why not. Witness continued: "He afterwards, when we were alone, handed it to me." If he handed it after the conversation the expression at the conversation, "It belongs to *Mary Jane*," could only be construed into a gift unattended by delivery. When he handed it witness says he remarked, "This is yours, never part with it unless you are sick or starving." Now as there is no reason to suppose that the father did not intend to return and continue the house-keeping, or that he considered this a final separation, it does seem strange that he should have accompanied the transfer with language adapted rather to either a very prolonged absence or an intention never to return. Such, however, is the plaintiff's own version of the matter, and her history of her title to the instrument. She adds, "I put it in my chest, it has never been out of my possession until it was taken from me." But it does not appear that it was ever taken from her. She parted with it voluntarily, as she alleges, upon a promise of restoration which was not fulfilled. She continues, "I had it from *January* until *March* next," which we may assume was about two months,—but proceeds, "*Mr. Russell* came to the house where I was and said, '*Fullerton* (defendant) wants to borrow the telescope;' I objected; he said, '*Fullerton* says on the honor of a man he will give it back;' I gave it up to *Russell*; he brought it to *Fullerton's* store; I have never seen it since." The demand and refusal are proven thus: plaintiff says, "I asked *Fullerton* (defendant) one day on hay scales to give it to me. 'Are you not willing to trust me with it?' he said, adding, 'I am the best friend you've got.'" If this were all, it would be difficult, I think, to construe this conversation into a demand and refusal. The impression created would rather seem the reverse, and that defendant, so far from refusing to re-deliver the article, had persuaded plaintiff to allow him to keep it. Witness then adds, "Going home from *Kentville* with *Fullerton* (defendant), who had taken out administration, I talked of the telescope;



he made no answer ; this was after what I said on the hay-scales ; I had gone up with him when he went to get administration ; this was nearly a year after he had got the instrument ; I wanted him to give it to me, and he made no reply ; there was an inscription on it by the Government ; my father estimated its value at \$400." Now is this a satisfactory proof of demand and refusal ? " I wanted him to give it to me," is the language used. But witness might have wanted defendant to give it without even asking for it, much less demanding it. This, however, is supplemented by *Woodworth*, who says, " I applied to defendant to deliver up the instrument ; he refused ; I applied before commencement of the action on behalf of plaintiff." Who *Mr. Woodworth* is, or what authority he had, does not appear. Further down he states that he applied on behalf of plaintiff. In *Edwards v. Hooper*, 11 M. & W., 303, it was held that demand and refusal is not evidence of conversion, unless the party upon whom the demand is made had at that time possession of the goods, and the means of delivering them up, of which there is no proof. There is no principle better settled than that where a defendant comes legally into the possession of property, and as in this case by the act of the plaintiff, that before trover will lie there should be such a demand and refusal to re-deliver clearly proven. In her cross-examination plaintiff says, " It, the telescope, was in a chest of my father's. He had the chest with him when he cast away the brig." What brig is referred to does not appear. " He did not take the telescope with him ; he kept, when at home, sea papers in the chest ; the quadrant was left in my possession, but not given to me ; I kept it (the telescope) in the chest ; at first it was not locked ; I took it out and carried it to *Russell's* when I heard they wanted it." From this it would appear that the telescope had remained with the quadrant and papers in the same chest (the father's chest), until delivered by plaintiff to *Russell* in *Russell's* house, a discrepancy not easily reconciled with that portion of the direct examination where she says, " I put it in my chest, it has never been out of my possession till taken from me ;" on cross-examination she says, " I gave it up to *Russell* and he brought it to *Fullerton's* store." The remainder of witness's examination is confused and anything but satisfactory ; she says, " I

told her (*Mrs. Russell*) that the chest had been broken open, I could not say whether such was the fact," and more to the same effect. A gift of chattels unaccompanied by delivery passes no property; see 5 *Bing. N. O.*, 56. A mere verbal gift of a chattel to a person in whose possession it is does not pass the property to the intended donee; 4 *Exch.*, 478; 2 *Str.*, 955. *Smith* is the next witness called by plaintiff, and the testimony he gives comes with an air of probability far more easily reconcilable with the case and its surroundings than the testimony of the plaintiff. After stating that *Clarke*, the father, had shown him the telescope, and had left it on one occasion three months or more with him, he adds, "He said he valued it highly, and if anything happened to him he wanted to give it to his daughter; he wanted me to keep it for his daughter if anything happened to him; on both occasions he expressed the same intention as regards his daughter 'if anything happened to him.' I was an appraiser; valued it at \$30." The testimony of *Smith* greatly weakens, in my mind, that of plaintiff. It is exactly what was natural, and what a man possessing such an instrument so obtained would be expected to desire should be done with it at his death. But that before his death he should absolutely part with the property in this telescope to his daughter or any one else, and enjoin that it should not be disposed of except as stated, seems anything but reasonable or probable. Then as to its value. Here is an appraiser, sworn we must assume, who, while he swears he considered it valuable, and knew that *Clarke* valued it highly, appraised it at \$30, and the verdict of the jury, without any reliable data, or any other guide as to value beyond the loose expressions of Captain *Clarke*, the father, in a conversation with plaintiff and others, in an action of trover, without any special damage alleged, find a verdict for \$350 damages. This is the plaintiff's case in brief.

The defence is substantially that the telescope was the property of *Clarke*, the father; that he died intestate and insolvent, and defendant was his administrator. To prove this, defendant is called. He produces the letters of administration, dated 1st *February*, and swears he is a creditor of the estate for \$1000 and upwards, and there are other creditors to an equal amount. The telescope was sold at private sale,

he says, for \$35. The claims against the estate exceed the assets. Had to apply to sell the real estate. Defendant positively swears, "plaintiff never applied to me for the instrument after it came into my possession, never claimed it as her own;" This rendered it the more necessary that the question of a demand and refusal should have been distinctly submitted and found by the jury. As to value, defendant says, "Several captains looked at it, and thought the sum given, (\$35) a high price. *Arabella Clarke* says, "I heard him (*Clarke*, father of plaintiff,) say he supposed the value was £25 or £30. The estate papers from the Probate office were received, and by consent, to be treated as in evidence, and it is added in the Judge's notes that it was arranged between them (the respective counsel) that it should be considered proved that the estate of *Clarke* was insolvent, and the reasons of this admission are given at length.

At the close of the plaintiff's case a motion was made, as appears, by defendant's counsel, for a nonsuit, but upon what grounds does not appear. Upon a careful consideration of the case, in view of the pleadings, the testimony, the charge, and the verdict, I am of opinion that, for other and still more substantial reasons than any yet referred to, the verdict ought not to stand.

It having been conceded by the counsel on both sides, and entered upon the Judge's minutes, that the estate of *Clarke*, the father, was insolvent, then the effect of the statute 13th *Eliz.*, chap. 5, in my opinion invalidates also the gift of the telescope to the plaintiff, assuming even that the same was delivered by the father to the plaintiff with intent to pass to her the property. The father left and went to sea immediately, and the presumption is reasonable and fair that if insolvent at his departure, he was insolvent at the date of the alleged gift, which was the very day before (line 25). There has been a great accumulation of decisions, at various times, as to the true construction of this statute, and the last of these, so far as my research extends, is the case of *Freeman v. Pope*, decided so late as *September*, 1870, 18 W. R., and introduced in the *Canada Law Journal*. Lord *Hatherly*, in that case, says: "The principle on which the statute 13th *Eliz.*, chap. 5, proceeds is this, that in all matters persons must be

just before they are generous, and debts must be paid before gifts can be made. If a person, unable to pay his debts, subtract from the property which is the proper fund for the payment of these debts that amount of property without which the debts cannot be paid, then, as the necessary consequence of his so subtracting that property, some creditor must remain unpaid, and these creditors must necessarily be delayed or hindered, and any Judge would inform a jury that in that state of circumstances they must infer the intent of the settlor who had so subtracted his property from the result of his act, (that property being applicable for the payment of his debts before he professed to give it away by way of bounty,) and accordingly bring it within the statute of *Elizabeth*. *Spirett v. Willets*, 3 DeG., J. & L., 293; with many, if not all, the modern cases were reviewed, and the *dictum* of Lord Westbury in delivering judgment in *Spirett v. Willett*, that it was immaterial whether the debtor was or was not insolvent after making the settlement, considered as an abstract proposition, was held to be going too far and overruled. It does not require that that *dictum* should be sustained to determine that the gift of the telescope in this case falls within the provisions of the statute. The judgment pronounced by Lord Hatherly, and concurred in by the Court, is in my mind fatal to the plaintiff's case. Here is a father admitted to be insolvent, by an act of bounty to his daughter subtracting from and diminishing the very fund which otherwise would have contributed toward the payment of his just debts; see *Story's Equity Jurisprudence*, 10th ed., secs. 353 to 359, *et seq.*; 3 *John*, 2nd Sch. & L., 714; 2 *Atk.*, 511, 573, 602. Fullerton the defendant, was administrator of the goods and effects of the estate of Clarke, the father, and the case reported in 5 *M. & G.*, 760, is conclusive as to the doctrine of these letters relating back to the death of the intestate for all purposes beneficial to the estate. See also upon this point *Williams on Executors*, 354, and a number of cases cited. In *Townsend v. Windham*, 2 Ves. 10-11, and so long ago as the times of Lord Hardwicke, he is reported to have said: "I know no case on the statute 13th *Eliz.*, where a man indebted at the time makes a voluntary conveyance to a child without consideration and dies indebted, but that should be considered a

part of his estate for the benefit of his creditors." In *Story's Eq. Jur.*, sec. 360, 10th ed., it is said: "A man actually indebted, and conveying voluntarily always means it to be in fraud of creditors." It has been suggested that the defence of the statute 13th *Eliz.*, is not available to an administrator, the representative at large of the donor, because the donor should be estopped from alleging his own fraud. But if that were so, still the case is very different when the administrator of an insolvent donor, or his assignee in bankruptcy asserts the statute in that character, the creditors of the donor come to be represented, and their interests are opposed to those of both donor and donee, and *Grimsby v. Bull*, 11 M. W., 531, is conclusive authority to show that the defence of this statute is available for an assignee of an insolvent debtor; *Butcher v. Harrison*, 4 B. and Ad. 129, is to the same effect. *Shears v. Rogers*, 3 B. and Ad., 326, put all questions of that kind at rest and sustained the position that a lease assigned by an insolvent testator was utterly void against creditors, and it was held to be assets in his hands. Lord *Tenterden* said: "The authorities show that whenever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claims of creditors, and the goods are assets in the hands of his executor; per *Littledale*, "it was utterly void, (the assignments made while insolvent,) both in law and equity;" per *Taunton*, "A creditor who objects to such an assignment as void need not have recourse to a Court of Equity. If executed when in insolvent circumstances the assignment is utterly void and fraudulent against creditors, and the case is to be considered as if it had never been executed. It must be so, or the statute of *Elizabeth* would be frustrated whenever and as often as a mistaken or dishonest testator or intestate dying insolvent should bestow his property on his children or favored friends, for none but the executor or administrator in such cases can claim." The very latest case under the statute 13th *Eliz.* is that of *Crossby v. Elworthy*, W. R., vol. 19, p. 842, decided by *Malins*, V. C., on the 24th May, 1871. "What a state of things that must be," said the V. C., "when the Court would sanction a man's making a voluntary settlement on his family when failing, and having

nothing to pay his creditors. He had asked counsel, and got answer, whether there was any case of a man making a voluntary settlement and failing shortly after, in which the settlement had been upheld. There was no such case, "and certainly," added the V. C., "one shall not emanate from me." Even as between donor and donee, since the recent case of *Barnes v. Foster*, 2 H. & N., 779, a plaintiff, it seems, is not precluded from showing that the sale was a mere cover to protect the goods from execution. Plaintiff in that case was in difficulty, and fearing that some of his creditors would issue execution against his goods, agreed with defendant that there should be a pretended bill of sale of them to him. For this purpose an invoice was made out and a receipt given to defendant for a sum stated to be the purchase money, and possession of the goods delivered to defendant as his own. Afterwards defendant sold the goods as his own, and plaintiff brought trover. *Held*, that plaintiff was not precluded from showing that no payment was in fact made, and that the transaction was not a real but a pretended sale; *Fisher's Dig.*, 7623. The case is clearly within the 13th *Eliz.*, chap. 5. The verdict should be set aside, and the rule *nisi* for a new trial be made absolute.

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### PITTS v. TAYLOR.

J. C. C., being indebted to the plaintiff, telegraphed defendant as follows: "I owe Daniel H. Pitts £1400. \* \* \* Will give you deed of property and confession of judgment if you accept amount," &c. Defendant, on the same day, replied: "Forward me the security and will accept draft at the time you mention." The orders were presented for acceptance, which was refused on account of the non-arrival of the securities, but defendant said that when the securities arrived he would accept. The title to the property referred to was in A. to whom a balance of \$800 was due on account of the purchase money. Plaintiff, in order to complete the title, gave his note to A. for the amount so due and procured a deed to be made in the name of defendant. The deed was tendered to defendant but he refused to accept, partly on account of the delay, and partly because the title to the property was not in J. C. C. at the time of the request and promise to accept.

There was some evidence of a distinct contract between plaintiff and defendant that if the former would procure the deed of the property the latter would accept, but the learned Judge who tried the cause instructed the jury that the only contract was that expressed in the telegram v. J. C. C., and defendant's reply thereto, and that this was a contract upon which the plaintiff could not maintain an action, and withdrew from the consideration of the jury the evidence as to a contract between plaintiff and defendant, and the question as to the reasonableness of the delay. The jury found for defendant and a rule for a new trial was taken under the statute.

*Held*, per SIR W. YOUNG, C. J., JOHNSTONE, E. J. and DUBARRAN, J., DOBB and WILKIN, J J., dissenting, that the rule for a new trial must be made absolute.

SIR WM. YOUNG, C. J., now, (July 26th, 1871), delivered the judgment of the Court :—

The plaintiff in this case relied upon his third count, and upon the telegrams of 7th October, 1867, in connection with the promises subsequently made by the defendant. It is clear that when the orders were first presented to the defendant he was not bound to accept them, because he had not got the deed. According to the plaintiff's evidence, the defendant said that when he got the deed he would accept the orders. The deed was to be from the *Archibalds*, of property of *Campbell*, at *Inverness*, the property being worth \$1,000, and the balance due on it to *Archibalds*, \$300. Upon this the plaintiff applied to the *Archibalds* for the deed, and gave them his own note for the \$300, which they put into the bank. The deed bears date a little over three months after the orders, and is in the name of the defendant, with release of dower and affidavits for registry. No question was raised as to its sufficiency to convey the title and perfect it in the defendant when recorded. It is a matter of no importance, as I think, whether the deed came from *Archibalds* or *Campbell*, if the title was good. The question is, had the defendant a right to reject it on account of this difference, and of the lapse of time between the 7th of *October* and the 13th of *January*. When the plaintiff tendered him the deed, about the end of *January*, the defendant said: "Do not be in a hurry, wait, *Campbell* will be up in a few days." *O'Connor* says: "The defendant said, when securities arrived, he would accept. He meant the deed and confession of judgment. I went to defendant with the deed in *January*; tendered it to defendant. His answer was that he had'nt heard from *Campbell* in three weeks. He made no objection to me about deed or warrant of attorney." The defendant, in his evidence says: "I refused to accept, saying the collateral securities had not reached me. A confession in my favor from *Campbell*, and the orders, were left with me. *Campbell* proposed to give me a deed of property he did not own. *Skerry* tendered me the deed. I thought, when I got the telegram, *Campbell* owned the land. If *Campbell* had produced the securities at the time, I would have accepted the bills. At last I said I considered the thing at an end. Before I got the deed tendered I said I would

have nothing to do with the orders." The defendant then sent to the bank and took up the plaintiff's note for the \$300, having taken a judgment against *Campbell* for \$4,000 on a confession which *Campbell* had sent him, without notice to the plaintiff.

The defence, therefore, rests on the deed having come from the *Archibalds*, and on the lapse of time being reasonable or otherwise, which, as I cannot help thinking, was a question for the jury. But the learned Judge, after telling the jury that the only contract in the case was to be found in the telegram from *Campbell*, and the telegram from the defendant in reply, and that the contract was one on which the plaintiff could not maintain an action, and remarking on the third count and the facts in proof, concluded by instructing them to find for the defendant, leaving them no option, which, as I think, they should have had.

I have looked with some care into the cases, and I incline to the opinion that had the contract depended on the telegrams alone, *Pitts* could not have maintained an action on them, though intended for his protection and benefit. It would seem that, under these circumstances, he would still have been considered a stranger to the consideration. In the case of *Tweedle v. Atkinson*, 4 L. T. Reps., (N. S.), 468; 1 *Best & Smith*, 393, *Wightman*, J., said: "It is now well established that, at law, no stranger to the consideration can take advantage of the contract, though made for his benefit." And *Crompton*, J., said: "The old cases are inapplicable to the modern action of assumpsit. The modern cases have overruled the old decisions, and it is now clear law that the consideration must move from the party entitled to sue upon the contract." This was held in 1861, and must be accepted as the *English* rule. It would appear from the note to the *American* edition of it, 101 *English Common Law Reports*, 398 that the rule is somewhat different there, and that the decisions in the Courts of the *United States*, while they are conflicting, generally lean the other way.

But the plaintiff did not rely on the telegrams alone, but on the subsequent promise of the defendant, founded on and recognizing them, and on the act of the plaintiff in procuring the deed, which he tendered to the defendant along with the



warrant, thus fulfilling the condition of defendant's telegraphic reply. In this view the text books favor, I think, the plaintiff's right of recovery. In *Smith's Leading Cases*, vol. 1, p. 70, it is said that the only difficulty that can arise in such cases is on the question that sometimes occurs, whether the consideration moved from the plaintiff, as, for instance, if A, in consideration of something to be done by B were to promise something to C, C being a stranger to the consideration, unless he, in some way had intervened between A and B, could not sustain an action on the promise, for which the case of *Price v. Easton*, 4 B. & Ad., 433, is an authority. But if the plaintiff have intervened in the agreement, that has been held to be sufficient, of which the case of *Tipper v. Bicknell*, 3 Bing., N. C., 710, is an example. This distinction is noted also in *Addison on Contracts*, 5th ed., 929. After stating the general rule, as above, he adds, "If the act or service, however, has been rendered to the defendant at the instance or request, and through the instrumentality and procurement of the plaintiff it has been held that the consideration moves from the plaintiff so as to enable him to maintain an action upon the promise, 1 *Ventris*, 207, Cro. Car., 408.

The main difficulty the plaintiff has to encounter is the *Statute of Frauds*. How far is the defendant's promise only a verbal promise to answer for the debt of another, and therefore within the statute, or an independent promise founded upon an act done by the plaintiff, at the request, express or implied, of the defendant. As the statute was scarcely mentioned at the argument, and no authorities were cited upon this point, I do not feel myself called upon to give an opinion on it. It is well worthy, however, of the consideration of the plaintiff's counsel.

I may suggest, also, another view of this case, on which nothing has been said, and that is the effect of the deed. In whom is the title of the property occupied by *Campbell*? Not in him, for he never had title. Not in *Taylor*, for although he obtained the first judgment against *Campbell*, that gives him no title, and he refused *Archibald's* deed when tendered to him. Not in *Pitts*, for his name is not in the deed, while *Archibalds* have executed a deed not yet delivered, and have been fully paid. Here is matter for the Court of Equity,

unless the parties have the good sense to look to the real merits of the case, and avoid the further interposition of Courts. As it is I think that further investigation of the case is essential to the ends of justice, and that it is our duty to make the rule absolute for a new trial.

JOHNSTONE, E. J.—I think the third count sets out a sufficient contract between plaintiff and defendant, that is to say, the plaintiff having delivered to the defendant a warrant to confess for \$1400, executed by *Samuel C. Campbell* in favor of the defendant, and presented to the defendant for acceptance two orders drawn by *Campbell* on defendant in favor of plaintiff. The defendant agreed that if plaintiff would procure to be made in his name, and tendered to him a deed of a piece of land and water at *Ingonish*, in possession of *Campbell*, he would accept the orders. The breach is that plaintiff at great expense did procure the deed and tendered it to defendant who refused.

The plaintiff swears that when he left with defendant the orders and confession, the defendant asked for the deed he was to get, referring to telegrams that had passed between *Campbell* and *Taylor*. Plaintiff promised to get it, and soon after defendant told plaintiff that when he got the deed he would accept the orders. Plaintiff tendered the deed, to which defendant took no exception. *Campbell* had bought from *Archibalds*, who held the title till the payment of the purchase money was complete, and plaintiff had to give *Archibalds* a note for \$300 before he could get the deed. *O'Connor's* testimony is to the same effect. The deed was produced, and is from the *Archibalds* direct to defendant. The defendant does not deny these statements, but essentially admits them. He says the orders and confession were left with him by plaintiff or some one on his behalf, and that the reason he gave for not accepting was that the collateral securities had not reached him. He also says that if *Campbell* had produced the securities at the time he would have accepted the bills. But he is silent as to the essential point, that he said to plaintiff that when he got the deed he would accept.

From the evidence it appears that the defendant dealt with the plaintiff and recognized him as the person who was

to procure the deed. There may be some ambiguity here, but that was for the jury, and there was certainly evidence enough to authorize the conclusion that defendant promised plaintiff that if he (the plaintiff) would get the deed he would accept, if the jury saw fit to come to that conclusion. The fact that the deed came from the *Archibalds* direct does not alter the case if the real estate was the same, and the title was conveyed to the defendants. Nor does a technical variance arise from that cause, because the third count does not necessarily mean that the deed was to come from the *Archibalds*, the allegation being that the title was in them,—and it is alleged that the deed tendered did convey the title to the defendant. There is indeed one point on which the count and evidence vary. It is stated that as soon as the deed was executed by the plaintiff, defendant promised to accept. This was not taken on the trial, and had it been it was an inadvertence to have been amended by altering the words “executed by plaintiff” into “obtained by plaintiff.”

The defence set up in the plea and by the defendant in his evidence, that there had been unreasonable delay, was for the jury.

The only points taken for nonsuit were that there was no consideration as regards defendant. There was consideration on both sides,—it was gain to the defendant to get a deed of land, it was loss to the defendant to pay money to procure it; what the value of the land was it was for the defendant to consider; it does not enter into the question. The objection was that there was no contract with plaintiff. But there was a contract with him if the defendant said to him, “If you will procure me a deed I will accept.” The evidence fairly bears this construction, if there was a doubt it was for the jury.

An objection has been taken on the Bench which was not taken at the trial or at the argument as far as my minutes extend, but which, if well founded, it is for the plaintiff's interest should be now stated. It is that the agreement should have been in writing as a promise to pay the debt of another. But I am of opinion that if there was a contract, it was original and not collateral, and that the *Statute of Frauds* does not apply.

The learned Judge having directed the jury to find for the defendant, without leaving the plaintiff's case to their judgment, I am of opinion that the rule should be made absolute for a new trial.

DESBARRES, J.—This was an action brought on a verbal agreement alleged to have been made by plaintiff with defendant, whereby the defendant agreed to accept two orders or inland bills of exchange, drawn upon him by one *J. C. Campbell* favor of the plaintiff, each for \$700, payable at 12 and 18 months from the date, the plaintiff procuring to be made out in defendant's name and tendering to him a deed of a certain piece of land situate at *Ingonish*, in the county of *Victoria*, in the possession of *Campbell*, the title whereof was in Messrs. *D. Archibald and Blowers Archibald*. It appears that *Campbell*, the drawer of the bills, being indebted to the plaintiff in the sum of \$1400, for which he was pressed for payment, on the 1st of *October*, 1867, at *Ingonish*, telegraphed to the defendant to this effect: "I owe *Daniel H. Pitts* \$1400; contrary to his promise he has come down upon me suddenly; will give you a deed of property and confession if you accept amount, half at 12 months and half at 18 months." To this the defendant replied by telegram dated *Halifax*, 7th *October*, 1867: "Forward me the security, and will accept the drafts at the time you mention." On receipt of defendant's telegram *Campbell* drew the orders or inland bills of exchange referred to, and handed them to *O'Connor*, the plaintiff's clerk or agent at *Ingonish*, together with a warrant of attorney to confess judgment in favor of the defendant for \$1400, being the amount of the two orders. These orders were shortly afterwards presented by plaintiff to defendant for acceptance, and *Campbell's* warrant of attorney to confess judgment was at the same time left with the defendant, but the defendant refused to accept the orders in the absence of the deed which he required from *Campbell* of his property. The plaintiff in his evidence says: "I got the orders in *October* the first time; I left the papers with defendant; defendant asked me where the deed was; the deed he was to get which I was to try to get for him; I told him I would get it; I called on defendant, again the next day in *Halifax*; he said when he

got the deed he would accept the orders. The deed was to be from the *Archibalds* of property of *Campbell's* at *Inverness*. The plaintiff obtained a deed from the Messrs. *Archibald* on giving them his note for \$300 and tendered it to the defendant about the end of *January*, 1868, who made no objection to the deed, but did not accept, nor did he expressly say he would not accept it; he merely said to the plaintiff when he tendered it, "Don't be in a hurry, wait; *Campbell* will be up in a few days." *O'Connor* says: "I called on defendant several times to get acceptances; defendant said when securities arrived he would accept; he meant deed and confession of judgment; I went to defendant with the deed in in *January*, tendered it to defendant; his answer was that he had not heard from *Campbell* for three weeks; he made no objection to me about the deed or warrant of attorney; I called on defendant several times before I got the deed; he did not accept the orders." The plaintiff rested his case on this evidence, and the question is whether it is sufficient to establish the contract set out in the third count of his writ on which he relies. The impression on my mind is that the evidence does not go far enough to support the third count, for it certainly is not at all clear that in saying he would accept the orders when he got the deed, the defendant meant it to be understood as a new contract with plaintiff apart from that he had previously made by telegram with *Campbell*. The language used was, as it appears to me, a mere reiteration of his engagement with *Campbell*, and not such as can be construed as making a new contract with the plaintiff himself. Now the evidence of the plaintiff on one side, and that of the defendant on the other, is not conflicting and irreconcilable. The defendant says that he knew nothing of the plaintiff in the transaction, and had no communication with him; that plaintiff, or some other person on his behalf, presented the drafts to him, and he refused to accept them, as the collateral securities had not reached him. He adds, "I declined at first, and ever since *Campbell* proposed to give a deed of property he did not own; if *Campbell* had produced the securities at the time I would have accepted the bills; I always gave the same answer, at last I said I considered the thing at an end; before I got the deed tendered I said I would have nothing to

do with the orders." It may be that *Campbell*, for whose accommodation, and at whose request, the defendant at first agreed to accept the bills, can maintain an action against the defendant for not accepting them when the deed was tendered to him, but it is quite clear that the plaintiff cannot maintain the present action unless he can show that the new contract he has declared upon was actually made with him by defendant. The jury were not required by the learned Judge to express any opinion as to the sufficiency or insufficiency of the evidence to sustain the new contract, his own impression being as mine is, that it only applied to the contract made between *Campbell* and the defendant. If the evidence on that point had been submitted to the jury, as I think it ought to have been, they possibly might have taken a different view of it, but as it was withdrawn from their consideration, I think there ought to be a new trial on that ground.

DODD, J.—This was an action on a contract between the parties in the cause, and the plaintiff claims under that contract a right to recover from the defendant the amount of two inland bills or orders drawn by one *Campbell* upon the defendant in favor of the plaintiff, which the defendant refused to accept, notwithstanding his contract so to do. The jury under the direction of the learned Judge who presided at the trial of the cause found a verdict for the defendant. The cause then came before the Court under a rule taken under the statute for a new trial. At the argument at the last term the counsel for the plaintiff contended that the Judge had improperly withdrawn from the jury the issue raised by the third count in his writ, that there was evidence given at the trial to sustain that count, but that the Judge had not submitted it to the jury.

The third count alleges that *Campbell*, being indebted to plaintiff in the sum of \$1400, drew, on the 9th October, 1867, two orders on the defendant payable to plaintiff, for that amount, at 12 and 18 months after date by equal payments of \$700; that plaintiff afterwards presented the said orders to defendant for acceptance, and at the same time tendered to him a warrant of attorney to confess a judgment in the

Supreme Court in favor of defendant for \$1400 and costs, executed by the said *Campbell*; that the defendant then agreed to accept the said orders if plaintiff would procure to be made out in his name and tendered to him a deed of certain lands, &c., situate at *Ingonish*, in possession of said *Campbell*, the title being in the Hon. *T. D. Archibald* and *Blowers Archibald*; that so soon as the deed was executed by plaintiff and tendered to defendant, he (defendant) would accept the said orders; that plaintiff at great costs and expenses did procure the said deed to be duly prepared and executed, and the title of the said premises to be thereby conveyed to the said defendant, and then tendered the same to him and then requested him to accept the said orders, but the said defendant refused to accept the same.

Our first inquiry must be to ascertain if there was any evidence to support this third count. The plaintiff's counsel at the argument contended that there was, and referred to the communications between plaintiff and defendant when he presented the orders for acceptance, and defendant then said, when he received the deed he was to get, he would accept the orders. The deed referred to by defendant must have been the deed mentioned in *Campbell's* telegram, and not any other. The telegram is as follows, from *Campbell* to defendant, dated 7th October, 1867:—"I owe *D. H. Pitts* \$1400; contrary to his promise he has come down upon me suddenly; will give you deed of property and confession if you accept amount, half at 12 months, half at 18 months." Defendant's answer:—"Forward me security, I will accept drafts." If the telegram referred to the land owned by the *Archibalds*, then *Campbell* undertook to do what he had not the power of doing; when he sent it to defendant he was not the owner of the land he agreed to transfer to defendant, it then belonged to the Messrs. *Archibald*, with whom *Campbell* had a verbal agreement to purchase, and to whom he had paid some part of the purchase money, but had not put any buildings on the property after the purchase; he was therefore in no position to give a deed to defendant, but entirely dependent upon the *Archibalds* as to whether they would give a title to the defendant or otherwise. It is somewhat strange that neither *O'Connor* nor *Campbell* refer in their evidence to the property that was

intended to be covered by the deed mentioned in the telegram. The natural conclusion that the defendant would draw from it, and what he did draw was that it referred to property then owned by *Campbell*, and that the deed and confession of judgment could and would be given to the defendant at the same time, and any promise that the defendant made to plaintiff that he would accept the orders when he received the deed must have had reference to property owned by *Campbell* at the date of the telegrams, and not dependent upon title to lands in other persons. The defendant admits that if *Campbell* had produced the securities at the time he would have accepted the orders, but before the deed was tendered he repudiated the whole transaction. It must be recollected the deed was not tendered until late in *January*, between three or four months after the date of the telegrams, and to my mind it is obvious that at that late date the defendant was justified in refusing to accept it, and also declining to accept the orders. I have failed to discover any evidence to support the third count. The count refers to a deed of land particularly described in the possession of *Campbell* and owned by the *Archibalds*, to be executed by him and tendered to defendant, and then defendant would accept the orders. The telegrams have no reference to *Archibalds'* property, and *O'Connor* in his evidence makes no reference to it. Upon his return to *Halifax* he says he called upon defendant, who said he would accept when securities arrived. The plaintiff says, "I presented the orders to defendant for acceptance, when he asked me where the deed was that he was to get;" which plaintiff says, "I was to try to get for him, and I told him I would get it." The next day he again called upon defendant, who said when he got the deed he would accept the orders. The deed was to be from the *Archibalds* of property of *Campbell's* at *Ingonish*, so says the plaintiff, but he does not say it was so understood by the defendant, neither does he in his evidence refer to the description of the land that the deed was to cover. The count describes it as land, and land covered by water, containing three roods or thereabouts. If this conversation amounted to a contract between plaintiff and defendant, then it was a substituted contract for that entered into between *Campbell* and



the defendant, without *Campbell* being a party to it. If under the contract by the telegrams between the parties to them, *Campbell* had furnished to defendant a deed of his own land and a confession of judgment, and upon their receipt by the defendant he had refused to accept the orders, *Campbell*, in that case, we may assume, would have had an action against him, but it would give no action to the present plaintiff; his right to an action can only grow out of the conversations he had with the defendant when he presented the orders for acceptance, and that right he has failed to prove under the third count of his writ, upon which alone he relied. There is no mutuality proved to support that count, therefore no consideration for the defendant to accept the orders. Had the plaintiff failed to procure the deed from the *Archibalds*, the defendant would have had no action against him; all by his evidence he had undertaken to do was to try to get the deed for the defendant. Such is the construction I put upon his words taking them altogether. The consideration must be such as the party undertaking has power by law to perform or cause to be performed. In *Harvey v. Gibbons*, 2 Lev., 161, the plaintiff declared that he being bailiff to J. S., the defendant, in consideration that plaintiff would discharge the defendant of a debt due to J. S., promised, &c. After verdict and judgment for the plaintiff in the Court below, it was reversed because the plaintiff could not discharge a debt due to his master. The same principle was recognized by *Kenyon*, C. J., in *Nerot v. Wallace*, 3 T. R., 23, when the consideration was that the plaintiffs who were assignees under a commission of bankruptcy against J. S. would forbear to proceed to have the examination of J. S. taken before the commissioners concerning certain sums with which J. S. was charged, and that the commissioners would forbear and desist accordingly. Lord *Kenyon* said, "The ground on which I found my judgment is this, that every person who in consideration of some advantage either to himself or another promises a benefit, must have the power of conferring that benefit up to the extent to which he professes that benefit should go and that not only in fact but in law. Now as to the promise made by the assignees, which was the consideration of the defendant's promise, it was not in their power to perform it,

because the commissioners had nevertheless a right to examine the bankrupt." The language of his Lordship is large enough and general enough to apply to the case we are considering. The plaintiff herein undertook to get a deed of land from the Messrs. *Archibald* for the defendant in consideration of defendant accepting the orders, he undertook in fact what he had in law no power to perform, as the *Archibalds* had the right to refuse the deed. The agreement between the plaintiff and defendant is wanting in its most essential element. Admitting it to have been the intention of the parties to it to make it a valid agreement, it should have been reduced to writing. It was an agreement on the part of the defendant to pay the plaintiff a debt due by him to a third party upon certain conditions which were certainly remote and depending upon uncertain contingencies. But apart from other considerations that press upon me in this case, I am of opinion that there was no binding or valid agreement between the plaintiff and defendant sufficient to support this action; as I have already said, to make it binding it should have been made in writing. Under these circumstances, I think the learned Judge was correct in directing the jury to find for the defendant, and that the rule for a new trial should be discharged with costs.

WILKINS, J.—The Judge who tried this cause told the jury, first, that the evidence disclosed no contract made by the defendant with the plaintiff; secondly, he instructed them in effect that, (if such a contract marked the case), the contract set out in the third count, confessedly the only one on which plaintiff could rely, was substantially different from the contract proved. It being an established principle that a plaintiff can only recover *secundum allegata*, we will first consider the second point adverted to, and try whether, in this case, the *allegata* and the *probata* are in accordance with each other. This must be answered in the negative upon the plaintiff's own showing. The count in question contains an allusion to the interchange of telegrams between *Campbell* and the defendant and the contract between those parties which it embodied, although that contract was made with the plaintiff's knowledge, and would, if car-

ried out, have operated for his benefit, and would have formed the basis of all negotiations and intercourse that afterwards took place between these parties and necessarily entered into their last, which were unmeaning and unintelligible without it. (Here the Judge read the third count.) Now what consideration is herein stated for the alleged promise of defendant to accept the bills in question. The answer of course is, "the plaintiffs procuring to be made out in defendant's name and tendered to him a deed of certain land in possession of the said *Campbell* and whereof the title was in the *Archibalds*." When the natural and obvious questions arise and are put, viz., "What deed was this, and of what land, and what connexion had the deed and the land with *Campbell*," the answers are found in the telegraphic correspondence referred to only, and that alone can give them. If, therefore, any such contract was made, the telegrams were an essential element—part and parcel of that contract. The plaintiff shows this. He says: "*Campbell* owed me in the fall of '67 about \$1400. I sent *O'Connor* to look after my business. He sent me these two orders on defendant—(the bills in question.)" He proceeds: "I presented them to defendant for acceptance, &c," and then follows what the plaintiff calls defendant's contract. Now, bearing in mind *O'Connor's* agency for plaintiff, he or plaintiff thus speaking by the same *O'Connor* who sent him these bills, "I took," says *O'Connor*, "the orders—the same orders bear in mind which plaintiff says he received from *O'Connor*—the orders sent on by arrangement with *Campbell*." Then follows: "*Campbell* sent a telegram to defendant. I saw it. (I, plaintiffs delegated agent,) saw it and dictated it. I also saw an answer to it. Again, on receiving answer, I drew out orders; prepared warrant; *Campbell* signed it. I sent it on with orders to plaintiff at *Halifax*." There, then, I pause, and ask, if a contract followed on this—a contract to accept these bills, is that contract set out by allegations which omit all this matter which preceeded the making of that contract and induced it and necessarily became an essential part of it. According to the contract set out the bills were agreed to be accepted solely and exclusively for the benefit of this plaintiff; according to the real contract proved and proved by plaintiff and his agent but omitted in the count, they were

agreed to be accepted solely for the benefit of *Campbell*. Having been drawn with that object, under what circumstances, and from what motive, and for what end were these bills drawn as proved? Well and truly might this defendant, regarding plaintiff's claim on him, as stated, say, "I knew nothing of the plaintiff in the transaction." How could the defendant meet the plaintiff and have his (defendant's) rights and interests protected without all the circumstances being alleged in the declaration?

The statement of consecutive facts and acts as given by the plaintiff himself is shortly as follows: "*Campbell* is largely indebted to him and is pressed for the debt. The plaintiff dispatches *O'Connor* to *Campbell's* residence at *Ingonish* to endeavor to secure that debt. *O'Connor* arranges the balance and urges payment to his principal. *Campbell* intimates that his friend (this defendant) may aid him. *O'Connor* dictates and *Campbell* writes and sends the telegram in evidence to *Taylor*. *Taylor's* answer is shown to *O'Connor*. On receiving this the bills written out by *O'Connor* are signed by *Campbell*. Here then is a contract between *Campbell* and *Taylor* which, if carried out, will effect payment of *Campbell's* debt to plaintiff. Plaintiff thus interested, and being informed by *O'Connor* of the above transaction, receives from *O'Connor* the bills in question drawn for the benefit of *Campbell* and the warrant of *Campbell* to *Taylor*, and presents for acceptance to *Taylor* these bills, leaving the confession with defendant at the same time. Then, and at this interview if at all a contract, the contract sought to be enforced is made by defendant with the plaintiff. I shall show presently that every syllable that passed at that interview had plain and certain reference to the antecedent contract alone between *Campbell* and defendant, and that there is in the case not a vestige of testimony that even looks to a new and independent contract between defendant and the plaintiff. Then probably defendant learned for the first time a fact in which he had no interest, that the title to the land which was to form his security was in the *Archibalds* and not in the *Campbells*. The Judge then told the jury correctly that the contract, if there was any, was to be found in the telegrams interchanged between *Campbell*—a stranger to the record—and the defendant. The

former, being pressed by the plaintiff for a debt, addresses this communication from *Ingonish, C. B.*, where he did business, to the defendant in *Halifax*, to whom he was then largely indebted :

" October 7th, 1867.

" To John Taylor :

" I owe *Daniel Pitts* \$1400. Contrary to his promise he has come down on me suddenly. Will give you deed of property and confession of judgment if you accept amount, half at twelve months, half at eighteen months.

" J. C. CAMPBELL."

The same day defendant replies by wire, thus :

" Forward me the security and will accept draft at time you mention.

" JOHN TAYLOR."

Some time in that same month plaintiff visits *Halifax*, and, anxious of course to get his debt secured, has an interview with the defendant, and knowing what had passed between *Campbell* and him, presents to him *Campbell's* drafts and his confession of judgment. Before stating what then took place it is necessary to remark that the fallacy of the argument of the plaintiff's counsel in predicated on what then occurred, a contract between the plaintiff and the defendant consists in this, viz., that obviously all that plaintiff said as to what took place at the interviews had relation to what the plaintiff knows to have previously taken place between *Campbell* and the defendant. The plaintiff says: " Defendant asked me where the deeds were," (meaning, of course, the deed which *Campbell*, not the plaintiff, had offered and engaged to send to the defendant.) Plaintiff again says: " next day defendant said when he got the deed," (meaning that same deed from *Campbell*.) " he would accept the orders," (*i. e.*, as he had engaged with *Campbell* to do.)

Viewing this as it cannot but be viewed in connexion with the telegrams, and then to construe it into a stipulation on the part of the defendant to do anything else, or more than he had, as plaintiff well knew already assumed to do to and for *Campbell*, would be simply preposterous. If so construed it would moreover be *nudum pactum* beyond all question. To have submitted a question on it to the jury, would have

been, in my opinion, most improper on the part of the Judge at the trial. All that passed was manifestly a mere recognition made to the plaintiff by defendant of what defendant had undertaken with *Campbell* to do for him, and could not be construed otherwise. As regards the allusion to *Archibald* made at the interview I shall speak presently. The same explanation must also be given of the conversation which took place in the following *January* between the plaintiff's clerk, *O'Connor*, and the defendant. This witness had dictated *Campbell's* telegram to defendant, and had seen the answer before he came to *Halifax*. Defendant then said to this person what he had before said to the plaintiff in mere recognition of his promise to *Campbell*: "When the securities arrive I will accept." Defendant had in that same month said to the plaintiff: "Don't be in a hurry; wait, *Campbell* will be up in a few days;" and he, not finding that *Campbell* came as he had expected, most naturally said to *O'Connor*, "I have not heard from *Campbell* for three weeks." This same witness adds: "Defendant made no objection to me about deed or warrant of attorney." It would have been strange if he had, for the defendant, when examined afterwards said, not being contradicted), "I knew nothing of the plaintiff in the transaction." There is not in the whole evidence a vestige of a contract between these two parties. The defendant says that he thought when he received *Campbell's* telegram that he owned the land which was to be his security, (he would appear to have first learned from the plaintiff that *Archibald* had the title) and that when this plaintiff presented the bills he refused to accept them, saying the collateral securities had not reached him. Plaintiff's own statement does not in substance contradict this. It entirely agrees with it.

There is no proof whatever of the consideration stated in the third count for defendant's alleged promises. The words used by the plaintiff at his first interview with the defendant in reference to the deed, viz., which I was to try to get for him, do not import, but negative a stipulation being then entered into, that plaintiff was to procure a deed from the *Archibalds* as the consideration of acceptance of the bills by the defendant. The plaintiff, at that same interview, in relation to that same deed, said: "I told him I would get it."

Such language will not bear the construction of a contract of an undertaking. Such, however, was the only language used on the subject, and it, *per se*, negatives the allegation in the count. It shows at most a pledge naturally gratuitously given to the defendant, (the plaintiff alone of these two parties having an interest in the doing of what he was to try to do), that he would try and get the *Archibalds* to make a title to *Campbell* of the land in question. It is certain, and it is as important to consider as it is certain, that the defendant had no interest whatever in getting this title perfected (as the deed was to be a mere security) except in the event of his accepting the bills—a subsequent act. He could therefore have no possible object at the time of the alleged contract with the plaintiff in using the plaintiff's agency to get the title from the *Archibalds*. He would not accept the bills. He was not bound to do so without first getting the title, and if he did not get the title he would not accept the bills. It was not possible, therefore, in the nature of things, that plaintiff procuring this title could constitute a consideration to support defendant's promise if it was made. The plaintiff, on the contrary, had an obvious motive for getting a title from the *Archibalds* to *Campbell*, because until that was accomplished he had no hope of getting payment from *Campbell* through the defendant. The plaintiff therefore gave his note to the *Archibalds*. Why the defendant took up the note he did not explain and was not asked to explain it; but it is certain that he was not induced to pay that note by any consideration respecting the plaintiff; for the plaintiff knew nothing of this act done by the defendant until it was done. He says, "The note got into the Merchants' Bank. I sent there to pay it. My messenger was informed that it was not there but was paid by the defendant. I did not request him to do so. The defendant says: "*Archibald* gave me notice of it." Thus the evidence shows conclusively that it must have been with regard to *Campbell's* interests alone that the note was so paid by the defendant. The plaintiff's evidence excludes the idea of defendant having paid the note under a compact with the plaintiff to do so. The plaintiff did not say, and we must presume it was because he could not say, that the defendant assumed to pay that note. It was clearly a gratuitous act

on the part of the latter so far as respects the plaintiff. Why defendant chose as between him and *Campbell* is a question which we are not called on to consider. *Tweedle v. Atkinson*, 1 Best & Smith, 393, is a decisive authority to the effect that by the law of *England* a stranger to the consideration of a contract as the plaintiff was in relation to defendant's contract, if any, with *Campbell*, cannot maintain an action upon it, though made for his benefit. The principle of that decision suggests a decisive view of this case, which was taken at the trial, I think, and certainly at the argument, but has not yet been noticed by me. If there had been a contract, as alleged, between the parties, and there had been a consideration to support it, still the action could not be maintained. It would have been an engagement of the defendant to accept the bills and so to answer for the debt which *Campbell* owed to the plaintiff. It was not in writing, and therefore the statute would have stood in the way of recovery. The well-known test applied would have been decisive for after it was verbally made, the plaintiff's right to sue his debtor, *Campbell*, remained unaffected by the verbal promise and in full force. See *Green v. Crosswell*, 10 Ad. & Ell., p. 459, per Lord Denman, who at the end of the judgment of the Court, pronounced by him, refers to and recognizes the principle of that list as laid down in note 1 to *North v. Stanton*, 1 Saund., 211 b., at the end of the note. The quotation is from the Library edition of *Saunders*.

I cannot but regard this action as an unconscientious attempt on the part of this plaintiff to make the defendant liable to him on an engagement which, irrespective of him, the defendant entered into with a third person. The defendant may have had the greatest reasons for not performing the engagements actually made by him with that person, and by his not performing it the plaintiff's former position relatively to that person has not been prejudiced; but whatever these reasons were, and whatever the effect on the plaintiff may have been of the defendant's conduct toward that third person, the plaintiff cannot, in my opinion, sustain the action, in view of the pleadings and the evidence. I am therefore of the opinion that the rule should be discharged.



THE COUNTY OF ANNAPOLIS v. THE WINDSOR  
AND ANNAPOLIS RAILWAY CO.

THE Windsor and Annapolis Railway is a Provincial Railway within the meaning of chapter 45, *Revised Statutes*, (3rd Series,) "Of County Assessments," section 16, and is exempt from assessment under the Act.

The true test of exemption depends upon the fact whether the road is or is not a portion of the Provincial Railway.

MCCULLY, J., now, (July 26th, 1871,) delivered the judgment of the Court:—

This is a case made after an appeal by defendants from an assessment which stands confirmed by the *Court of Sessions of Annapolis County*, the appellate tribunal under chap. 45, *Rev. Statutes*, and the question raised by the case is whether the *Windsor & Annapolis Railway*, including the lands, stations, rolling stock, &c., is, or is not exempt from taxation under sec. 16 of chap. 45 of the *Rev. Statutes* above referred to. The *Provincial Act*, chap. 1, of the Acts of 1854, consolidated in chap. 70, *Rev. Statutes*, 3rd Series, is entitled "An Act to authorize the construction of Railways in this Province." The preamble is as follows:—"Whereas the construction and maintenance of a trunk line of railway from the harbor of *Halifax* to the frontier of *New Brunswick*, with branch lines extending to the harbor of *Pictou* and to *Victoria Beach*," (a place in the direction of and beyond *Annapolis*), "will greatly facilitate the internal trade of *Nova Scotia*, will develop her resources, enlarge her revenue, and open more frequent and easy communication with the neighbouring Province and States, be it enacted:—"

In this preamble the policy and object of constructing railways in this Province from and to the points described, are clearly set forth, and the railway between *Windsor* and *Annapolis* constitutes, as will be hereafter seen, a section of a branch from *Halifax* to *Victoria Beach*. Section 1 declares that "the lines,"—in the plural number—of railway to be constructed under the provisions of this Act shall be public provincial works, &c. Section 2 designates the line to be first completed and constitutes it a common trunk. It was to begin at the harbor of *Halifax* and extend northerly, and

this trunk was to be common for all the lines to be thereafter made under the provisions of said Act. It is the trunk line for the W. & A. Railway at the present time. Section 3 provides that after the common trunk shall have been so completed "the railways,"—in the plural number—"shall be carried on in such directions as shall be approved of by both Houses of the Legislature," &c. The remainder of the Act is devoted to details providing for the manner of constructing those railways, maintaining, repairing and using them. This Act, as remarked, with others, was consolidated at a subsequent date, constituting chapter 70 of the *Revised Statutes*, 3rd Series.

In the year 1856 was passed an Act of the Provincial Legislature, entitled, "An Act to establish a more equal and just system of assessment," which, amended and consolidated with other legislation, constitutes chapter 45 of the *Revised Statutes*, 3rd Series. Under it the present assessment is made and sought to be enforced. Section 16 of chapter 45 (being a transcript of section 4 of chapter 26, Acts 1856, slightly altered in some particulars,) exempts from tax "the Provincial Railway rolling stock and railway stations and lands attached thereto or to the railway."

The contention on the part of the appellants is that the railway is a branch of the trunk line described in 1854, and that it is a Provincial Railway "within the exemption clause of chapter 45 above mentioned." On the part of the respondents it is contended that this railway being constructed by a company incorporated by chapter 1, Acts of 1866, by the name of the *Windsor & Annapolis Railway Company*, and under an Act passed on the 2nd day of May, 1865, and the agreement set out in the Act of 1866, it is not a Provincial Railway within the exemption of chapter 45, and is therefore liable to be assessed and rated as the property of an incorporated company. To entitle the appellants to the exemption sought it must be clearly made to appear that the *Windsor & Annapolis Railway* is a provincial railway. Now, the agreement set out in chapter 1 of the Acts of 1866, in its very first clause refers to the Act of 1865, and sets out its title as "An Act to provide for the construction of two other sections of

the Provincial Railways." See also chap. 7, Acts of 1867. In the view of the Legislature there never has been, I think, and there is not at present, but one Provincial Railway in *Nova Scotia*, though where referred to as trunk and branches, it is subsequently spoken of as the Provincial Railways, composed of a trunk running northwardly with two branches, one running from *Truro* to *Pictou*, the other from *Windsor* towards *Victoria Beach*, and the Act of 1865 makes provision "for the construction of the following sections" (using the language of the 1st clause): "of the Provincial Railway, that is to say, from *Truro* to the boundary line of *New Brunswick*, and from *Windsor* to *Annapolis*," &c. Can language make it clearer that the *Windsor & Annapolis Railway* is a section of the Provincial Railway? And if the Provincial Railway, its rolling stock, railway stations and lands attached thereto, or to the railway, are exempted as they are from taxation, how can it be said that one of the sections of this very railway is not exempted? The respondents' answer to this is,— But the *W. & A. Railway* is private property, owned, occupied, managed and controlled by a joint stock company. Supposing that to be conceded to the fullest extent, although I do not view it exactly in that light, yet the true test of exemption, it must be conceded, depends upon the fact whether it is, or is not, a portion of the Provincial Railway. It is quite true that by the 8th section of the Act of 1866 it is provided that the company shall own the said railroad, and that by the agreement set out in the Act of 1866, it is also provided that "the said line of railway, the Avon Bridge, &c., with all and singular the appurtenances, when built shall be the property of the company, and shall be managed and upheld by them at their own proper cost and charge." Property in, or the use and management of the railway, or either of its branches, is not the test under chapter 45. It is whether this be a portion of the Provincial Railway.

But their rights in, and use of this railway, by other clauses of the same Act and agreement, are largely qualified. The Legislature and Provincial Government granted to *George Knight & Co.*, and their assignees, the appellants, (being such assignees) large and valuable subventions towards constructing this Provincial Railway, a railway which it was expected

would facilitate the internal trade of *Nova Scotia*, develop her resources, enlarge her revenue, and open more frequent and easy communication with the neighbouring Provinces and States, and transferred to them a property in the road, subject, nevertheless, to many important conditions and qualifications, (see Acts of 1865 and 1866, already cited,) restrictions inseparable from it and its use, into whose ever hands it might thereafter fall. Among other things, "all lands required for the railway track and appurtenance," it was stipulated should be provided *gratis* to the company, as one of the inducements to construct the road. But are we to assume that either the letter or spirit of that engagement is kept inviolate if those very lands are seized and confiscated for public local taxes, to be assessed for public municipal purposes? If the case rested upon this construction of the legislation, much, I think, might be urged to entitle the company to be exempted from land taxation. But on broader grounds, and because it is the policy of the Legislature to withdraw from the operation of the Assessment Act all public property, and *quasi* public property, such as is enumerated in section 16, chapter 45, among other things, "places of worship, church funds, burial grounds, real estate of colleges, academies, or other seminaries of learning, school-houses, town-halls, temperance-halls, &c., and moneys invested in Provincial debentures,"—a class of securities issued to construct the Provincial Railway. (See chapter 7, Acts 1867, already referred to.) I am clearly of opinion that the *Windsor & Annapolis Railway*, being a section of the Provincial Railway, is within the exemption in section 16 of chapter 45, and "its rolling stock, railway stations and lands attached thereto, or to the railway, are not liable to county or other local taxation.

THE QUEEN *v.* LEDANTE.

WHERE a prisoner is indicted for feloniously wounding with intent to do grievous bodily harm, the intention may be inferred from the act.

RITCHIE, J., now, (July 29th, 1871,) delivered the judgment of the Court:—

We think the learned Judge who tried this case instructed the jury correctly. The counsel for the prisoner contended that on a charge of feloniously wounding with intent to do grievous bodily harm, to justify a conviction the intent must be proved independently, and that it could not be inferred from the act, and that as malice was essential no conviction could take place, unless, if death ensued, the crime would have amounted to murder. No cases were cited in support of these propositions, and all the authorities on the subject lead to a contrary conclusion. By the statute 31 & 32 *Vic.*, chap. 20, wounding or committing grievous bodily harm with intent to commit murder is made a special offence, punished capitally. (See sec. 10.) By the 17th section whoever unlawfully and maliciously, by any means whatever, wounds with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm, shall be guilty of felony and shall be liable to be imprisoned, &c. The *English* statute has a similar clause, and the decisions on it have settled the questions which have been raised in this case. In *Reg. v. Nichols*, 9 C. & P., 267. *Gurney*, B., in charging the jury said: "I am clearly of opinion the Act applies to all cases, whether, if death had ensued, it would have been murder or manslaughter. It is the very object of the Legislature that it should do so, and all the Judges are of opinion that it does." See also 2 *Moody*, C. C., 40, Anon. The case of *Rex v. Griffith*, 8 C. & P., 248, seems directly in point, and shows that "maliciously" in the section does not mean "malice aforethought." *Alderson*, B., there told the jury that if they were not satisfied that the prisoner inflicted the injury with any of the intents laid, they might find him guilty of the assault. The intent is the only question I should leave to the jury. It is only necessary that the offence should have been committed

maliciously, and with some one of the intents laid. By the term malice is not meant malice aforethought. If a man inflict such injuries as these, can he do it without intending some serious bodily harm. You will consider whether the prisoner wounded the prosecutor with either of the intents laid, or whether he did it in self defence. In *Reg. v. Hawle*, 7 C. & P., 274, which was a charge of wounding with intent to do serious bodily harm, *Alderson*, B., said: "When a deadly weapon, as a knife, sword, or gun, is used, the intent is manifest, but with an instrument like the present, "a tin can," you must consider whether it was so used as shows that the prisoner intended to do some grievous bodily harm. In *Rex v. Cox*, Russ. & Ryan, 362, the Judge, as Judge *Dodd* did in this case, charged that the intention might be inferred from the act, and on reference to the Judges the charge was approved.

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### MCDONALD ET AL. v. BRODIE.

PLAINTIFFS purchased from W. M. a quantity of hay described to be growing on a tract of land specified. The hay, when cut, was deposited by permission of W. M. in a barn on the premises. At the time of the purchase a law suit in reference to the ownership of the land was depending between W. M. and the defendant. One of the plaintiffs knew of the suit, and the other that the title was disputed. A verdict having been found for the plaintiffs, a rule was taken out for a new trial, which, it appearing on argument that the defendant had a clear legal title, and possession in law, was made absolute with costs.

WILKINS, J., now, (August 7th, 1871,) delivered the judgment of the Court:—

The following facts were proved and uncontradicted at the trial, and they are sufficient to show that the verdict given for the plaintiffs should not stand. The hay, the subject of the action, was made from grass that, on the 18th June, 1867, was, by a written agreement in evidence, transferred by a *William McKenzie* to the plaintiffs, described to be then growing on a tract of land particularly specified. The grass was mowed in August of that year, and the hay when made was deposited by *McKenzie's* permission in a barn which *McLean*, one of the plaintiffs, said he considered to be *McKenzie's*. In March, 1868, plaintiffs demanded the hay of defendant, who

refused to deliver it. The defendant is admitted to have been then in possession of the premises on which the hay was cut, and of the barn in which it was. One of the plaintiffs admits that when the grass was purchased he knew that the title to the premises was in dispute between *McKenzie* and the defendant, and the other plaintiff admits he was aware that a law suit was then depending between these persons. It was proved on the defence (and there was no opposing testimony) that from *June*, 1866, to *August* of that year, *McKenzie* occupied the premises in question under the defendant by his permission and as his servant on wages; that wages were paid him, and that, at the expiration of that period, *McKenzie*, without restoring the land to him, the defendant, from whom he received it, or whose title to it he so acknowledged, according to the undenied language of the defendant, then refused longer to act as defendant's servant, and set up a claim to the land. The defendant in his cross-examination, after specifying the wages that he had agreed to give *McKenzie*, states that the agreement between them was to be for a year, but that in *August* of that year, which began in *June*, *McKenzie* repudiated it, still holding on to the land. *Angus McAvor*, one of defendant's witnesses, says he was present at the agreement between defendant and *McKenzie*, made three or four years before the trial (in 1869), and that by that agreement *McKenzie* was to remain three years on the place. This witness corroborates the defendant as to the nature and character of the wages which the latter was to give *McKenzie*, and there is not necessarily a discrepancy between the witness and defendant as to the term of *McKenzie's* holding.

In this state of facts I am of opinion that so far from the plaintiffs being entitled to that verdict which the jury were in a qualified manner instructed to give, and did give to them, the grass in question must be taken to have been, in point of law, cut without defendant's permission on land in his possession, and that his title to it was not altered by the successive acts of *McKenzie* and these plaintiffs in relation to it, and that it was when converted into hay, when in the barn in question, when demanded by plaintiffs, and when sold by defendant, his property in point of law. I think, therefore, the verdict should be set aside and a new trial granted.

I may add, on the point reserved by the learned Judge who tried the cause, the question of the defendant's title, that assuming the record of the judgment in evidence legal, as I think it undoubtedly was, even had no *habere facias* been shown by its return to be executed, there was, in my opinion, abundant evidence from which the jury could not but have inferred that the possession which defendant is admitted to have had of the premises in *March*, 1868, was a possession taken under that judgment in the previous month of *October*. *McDonald*, the plaintiff, says, "When I went there in *October*, 1867, the sheriff and defendant were there." This was after a writ had been issued on 1st *March*, 1867, by the defendant against *McKenzie*, and after a judgment obtained therein on the 28th *October*, 1867, and a writ of *habere* issued on that day. The effect of that judgment, and a taking possession under it, would have been to give the plaintiff a possession in law from the 1st *March* and antecedently to the agreement under which plaintiff claimed a right to cut the grass of which the hay in question was made. As the jury found for the plaintiff, subject to the points so referred, and as I think the defendant had a clear legal title to the possession at the times in question, and moreover actual possession in law, and that a jury on a new trial, under the same facts, would have to be so instructed, I think, (without commenting on the exceedingly suspicious particularity, generality, and coincidence in date to the legal proceedings of the written agreement in question, about which a good deal ought to be said to a jury,) the rule for a new trial should be made absolute with costs.



## DODSON v. THE GRAND TRUNK RAILWAY CO.

In the absence of legislative enactments of a restraining character, a railway or steamboat company may impose such terms upon the public as to exempt the company from responsibility for injury however caused, including, therefore, gross negligence, and even fraud or dishonesty on the part of their servants.

SIR WILLIAM YOUNG, C. J., now, (August 7th, 1871.) delivered the judgment of the Court:—

The plaintiff in this case imported in *February*, 1868, from *Montreal* 100 dressed hogs, through the medium of the defendants, by way of *Portland*, under the usual shipping papers, signed by his agent and by the Managing Director of the Company, forming a special contract which is set out in the amended writ. By the 2nd condition: "Fresh fish, fruit, meat, dressed hogs and poultry, or other perishable articles, are declared to be carried only at the owner's risk," while by the 16th condition, in respect to live stock: "The owner undertakes all risk of loss, injury, damage and other contingencies in loading, unloading, transportation, conveyance and otherwise, no matter how caused."

On arrival, the hogs were found to be damaged to the extent of \$488, and the jury found upon the trial that the injury was caused by the negligence of defendants' servants, and gave a verdict for plaintiff subject to the opinion of the Court on all legal objections. There was no imputation, as we read the amended counts, nor was there any evidence of wilful wrong, destruction, or wanton abuse of the property, but only of mis-management, carelessness and neglect, which, in the opinion of the jury, rendered the defendants liable; unless it should appear that the defendants are protected by the terms of the special contract.

Upon the pleadings and the evidence that is the sole question before us. It is to be decided according to the principles of the Common Law, neither the *English Carriers' Act* of 11 *Geo. IV.*, and 1 *Wm. IV.*, nor the *Railway and Canal Traffic Act* of 1854, being in force in this Province. The numerous cases cited at the argument have, therefore,

only a partial application, and will aid us chiefly by way of illustration and analogy. They are reviewed at much length and with singular ability in the case of *Peck v. North Staffordshire Railway Co.*, 10 House of Lords Cases, 473, decided in 1863. Several of the Common Law Judges were called in to assist the Lords in that case, and Mr. Justice *Blackburn* delivered an elaborate opinion, endorsed by Lord *Wensleydale*, better known as Baron *Parke*, and both, as we all know, very eminent lawyers. Of the opinions in this leading case we will, of course, avail ourselves, as affording a sounder view of the decisions, and of higher authority than any we could ourselves prepare.

According to Mr. Justice *Story*, (*Commentaries on the Law of Bailments*, 549,) common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the Common Law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in cases of gross negligence and fraud, or by demanding an exorbitant price compel the owners of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct. Judge *Blackburn* (10 H. L., 494,) argued that the weight of authority was in favor of this view of the law, but he added that the cases decided in the *English* Courts between 1832 (that is, two years after the passage of the *Carriers' Act*, but not depending upon it,) and the year 1854, established that the doctrine so enounced by *Story* was not law, and that a carrier might, by a special notice, make a contract limiting his liability even in cases here mentioned, of gross negligence, misconduct or fraud on the part of his servants, and the Judge held that the reason why the Legislature intervened in the *Railway and Canal Traffic Act*, 1854, was because it thought the companies took advantage of those decisions (in *Story's* language) to evade altogether the salutary policy of the Common Law.

It is to be observed, however, while recognizing such policy, that the right of making special contracts or qualified accept-

ances by common carriers, seems to have been asserted in early times. Lord *Coke* declared it in *Southcotes* case 4 Co. Rep., 84, where he says that "if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance." See also the case of *Mors v. Stine*, Vent. 238. This, says *Story*, is now fully recognized and settled beyond any reasonable doubt, and he cites a whole array of cases. See also 1 *Parsons on Contracts*, 708-715.

In *Nicholson v. Willan*, 5 East, 512, decided long before the *Carriers' Act*, Lord *Ellenborough* said, that there is no case to be met with in the books in which the right of a carrier to limit by special contract his own responsibility has ever been by express decision denied,—the Court cannot do otherwise than sustain such right, however liable to abuse and productive of inconvenience it may be, leaving to the Legislature, if it shall think fit, to apply such remedy hereafter as the evil may require. It is remarkable that just fifty years elapsed after this wise suggestion in the Courts before it was adopted in Parliament.

In *Carr v. Lancashire & Yorkshire R. R. Co.*, 7 Exch. Rep., 707, decided in 1852, on which the 16th condition we have cited as to live stock is plainly founded, where the jury found as a fact that the plaintiff's horse had been injured through the gross carelessness of the defendants, they had guarded themselves by a notice in these words: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage, (howsoever caused) occurring to live stock of any description travelling upon the *Lancashire & Yorkshire Railway*, or in their vehicles." The finding of the jury was not complained of, just as we approve of the finding of the jury here, yet the Court of Exchequer held that this was a special contract by which the plaintiff had taken upon himself all risk, just as in this case, the defendants stipulated that the hogs were carried "only at the owner's risk"—the only difference being in the words "howsoever caused, or no matter how caused," on which we will presently remark, "It is not for us," said Baron *Parke*, "to fritter away the true sense

and meaning of these contracts. If any inconvenience should arise from their being entered into, that is not a matter for our interference, but it must be left to the Legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability. We are bound to construe the words used according to their proper meaning, and according to the true intention of the parties as here expressed."

This case was much relied on by the defendant's counsel, with that of *Wilton v. Atlantic Mail Steam Company*, 10 C. B., N. S., 453, where the same principles were applied to carriers by sea, and the Company was relieved of liability for the negligence of the master, by virtue of a special contract which provided that they should not be accountable for luggage unless a bill of lading had been signed therefor.

The decisions in favour of Railroad Companies, culminating in the case from 7 *Exch.*, brought down upon them to use the strong expression of one of the *English* Judges, the Act of 1854, the 17 & 18 *Vict.*, Chap. 31, by the 7th section of which every such Company shall be liable for loss of, or for any injury done to live stock or goods, occasioned by the negligence of their servants, notwithstanding any notice, condition, or declaration made and given by such Company, contrary thereto, or in any way limiting such liability—every such notice, condition, and declaration being thereby declared to be null and void. Then follow five provisos, the first of which declares that nothing herein contained shall be construed to prevent said Companies from making such conditions in the premises, as shall be adjudged by the Court or a Judge, before whom any question relating thereto shall be tried, to be just and reasonable.

The fourth proviso declares that no special contract between such Company and any other person respecting the forwarding or delivery of live stock or goods shall be binding upon or affect any such party, unless signed by him or by the person delivering such animals or goods respectively for carriage. This proviso and the practice under it, have doubtless suggested the form of the shipping papers or contracts used by the Grand Trunk Railway Company.

Subsequently to this Act of 1854, the cases have mainly turned on the justice and reasonableness of the conditions imposed by railroad companies, and the fact that this is to be settled by the Courts affords to the public an effective and most valuable protection. It is true that the 7th section with its hosts of provisions, is not spoken of in the most complimentary terms. Lord *Westbury* assails it for its cumbrous language, and Mr. Justice *Wills* calls it an element of confusion. Its true construction, too, has led to a great variety of opinion. Still though susceptible of improvement, it has been found a valuable enactment, and in the principal case from House of Lords, it will be instructive to review the terms of the condition then in controversy, and the opinions it elicited.

The action was brought for injury done to three marble chimney pieces sent by railway, and the Company sought to protect themselves by the following condition: "That the Company shall not be responsible for the loss of or injury to any marbles, musical instruments, toys, or other articles, which from their brittleness, fragility, delicacy, or liability to ignition are more than ordinarily hazardous, unless declared insured according to their value." It appeared by the evidence that the price of the carriage was 55s. stg. per ton. Ten per cent. of the value was demanded for insurance which the consignor declined paying and sent the chimney pieces uninsured,—their value was £210, and the injury done to them was estimated at £25.

To persons who are sometimes astonished at the difference of opinion in Courts of Justice, it may give a curious and useful lesson, to mark the variety in this case. It was tried before Mr. Justice *Erle*, who thought the conclusion reasonable and just, and directed a verdict to be entered for the defendants. Upon argument in the Queen's Bench, Lord *Campbell* and Mr. Justice *Crompton* took the opposite view, and judgment was given for the plaintiff. This decision was reversed in the Exchequer Chamber by Chief Barron *Pollock*. Mr. Baron *Martin*, Mr. Justice *Willes* Mr. Baron *Watson* and Mr. Baron *Channel*, and judgment was given for the defendants, Mr. Justice *Williams* dissenting. In the House of Lords

of the Judges, besides some of the above called in to assist, Chief Justice *Cockburn* and Mr. Justice *Blackburn* gave their opinions for the plaintiff. So that of these Common Law Judges, including two Chief Justices and the Chief Baron, it turned out that five were in favor of the plaintiff and six for the defendants. In the House of Lords, the then Lord Chancellor (*Lord Westbury*) after remarking with deference that he could not believe that there was in the matter itself any very serious difficulty, combined with Lords *Cranworth* and *Wensleydale* in giving judgment for the plaintiff, thus reverting to the original judgment which had been reversed in the Exchequer Chamber, while Lord *Chelmsford* thought the judgment should be for the Company.

Now as to the condition itself, which is the converse of the second condition in the case in hand, it was remarked that the defendants had chosen the very words used by the Legislature in the *Carriers' Act*, and that these very words were determined in *Hinton v. Dibdin*, 2 Q. C. Rep., 646, to exempt the carrier from liability for loss or injury occasioned by gross negligence of the carrier's servants. Mr. Justice *Crompton* observed that he had great difficulty in taking a refined distinction between a stipulation to be free from any loss and injury, as in the present case, and to be free from responsibility for any injury or damage, "however caused," which the Court of Exchequer decided, in *Carr v. The Lancashire and Yorkshire Railroad Company*, to include cases of gross negligence; but, he added, I think that a condition that the Company shall not be responsible for losses, which appears to me to include losses by every species of gross negligence, ought not to be held just and reasonable. It is to be noted that the Judges, who were for the defendants, did not dissent in substance from this view, but thought that in the true construction of the condition, losses occasioned by gross negligence did not come within it.

The Court of ultimate appeal, by a majority of three to one, forming with the other Judges a majority of eight to seven of the judicial minds employed upon this important case, decided that the condition imposed by this Company was unreasonable and unjust, and the minority did not differ

with them as to its essential character. Now, this is an enquiry of the highest practical importance to us. This Court has now unanimously held that by the law as it obtains in this Province, and probably in all the other Provinces of the Dominion, there is no law to restrain the Grand Trunk Railway Company from exacting such terms and imposing such conditions as they think fit in their printed papers, which the public using the railway must accede to. We give no opinion, whether the condition in the case in hand is reasonable or otherwise; much is to be said for and something to be said against it. But as it is essentially the same with the condition in *Peck's* case, it is well to ponder on the significant words of the Lord Chancellor "that the necessary effect of such a contract would be, that it would exempt the Company from responsibility for injury, however caused, including therefore, gross negligence and even fraud, or dishonesty on the part of the servants of the Company,—for the condition is expressed without any limitation or exception." In a passage we have already cited, Mr. Justice *Blackburn*, with the apparent assent of the Law Lords, certainly with that of Lord *Wensleydale*, declared that "at Common Law a carrier might by a special notice make a contract, (and the Queen's Bench of Ontario has decided that there is no distinction between a notice and a condition forming a part of a special contract) limiting his responsibility, even in the cases of gross negligence, misconduct, or fraud on the part of the servants."

We are far from thinking that the Grand Trunk Railway Company would push its advantages, or avail itself of the law to such extremes. But as the *British North America Act*, 1867, in the 91st and 92nd sections declares that the exclusive legislative authority belongs to the Parliament of *Canada*, over "lines of steam or other ships, railways, canals, telegraphs, and other works and undertaking connecting the Provinces with any other or others of the Provinces, extending beyond the limits of the Province," we think it right to call the attention of the *Dominion* Government and Legislature to what we conceive to be the actual state of the law upon a question so deeply affecting the trade and commerce of the country.

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It may be that with a view to their protection Parliament may deem it advisable to enact a law for the whole *Dominion*, founded on the Imperial act of 1854, with such modifications as the experience of the mother country and the decisions since that period will naturally suggest.

In the case in hand we are constrained by the authorities to set aside the verdict for the plaintiff, and award the defendants a new trial with costs of argument.



DECISIONS  
OF THE  
SUPREME COURT OF NOVA SCOTIA,  
DECEMBER TERM, 1871.

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LECAIN v. HOSTERMAN.

THE plaintiff brought suit for a partition of certain lands under the following circumstances: The defendant and his brother were devisees under their father's will of a large tract of land which they held as tenants in common. They executed two mortgages thereon which were outstanding at the time of action brought. A judgment was subsequently obtained against the brother, and an execution issued, under which his undivided half was offered for sale, and purchased by plaintiff who received a deed from the sheriff. After the execution of the deed it was discovered that the description therein as well as in the advertisements of the sale was erroneous. The plaintiff seeking partition the defendant resisted, and pleaded, 1st, That the brother was still in possession adversely to the plaintiff, and that the latter therefore could not maintain an action for partition, not having the possession; and 2nd, That plaintiff ought not to have partition, inasmuch as his application, if granted, would be only nugatory and inoperative and subject defendant to costs.

*Held*, that the sheriff's deed gave sufficient seisin for a proceeding of partition; that on the trial the title of the judgment debtor might be investigated; that the errors in the description could be corrected by reference to the other portions of the description; and that the outstanding mortgages were no bar to plaintiff obtaining the partition sought.

The Supreme Court of Nova Scotia possesses all the powers with reference to suits in partition with which the Equity Court in England is invested.

YOUNG, C. J., now, (December 5th, 1871,) delivered judgment, as follows:—

This was a petition for partition of lands, followed up by a writ under the *Revised Statutes*, chapter 139, and pleas put in by the defendant. The premises were set out on a plan annexed to the writ, and, with two small pieces excepted, consist of the *Hosterman* property, situate at the head of the North West Arm, on the western side. They were devised by the late *Thomas Hosterman* to his sons *John Edward Hosterman*, the defendant, and *Charles O. Hosterman*, by whom the property was held in common. They mortgaged it

to two parties named in the petition. Those mortgages are still outstanding and liable to be foreclosed. A judgment for a large sum was then obtained against *Charles O. Hosterman* and an execution issued under which his undivided half was offered for sale, and the plaintiff became the purchaser, and, having paid the consideration money of \$7200, holds under a deed from the sheriff, dated *December 30th, 1868*. The proceedings are admitted to have been regular save in one particular of no great moment; but after the delivery of the deed it was discovered that the description therein, as well as in the advertisements, was erroneous in designating one of the lines as running *southerly* in place of *northerly* and making the beginning stone at the *southern* in place of the *northern* boundary of the Admiralty property. The mortgages were not proved at the trial; but it was stated at the argument that these errors are found in the two mortgages, and that the sheriff and the plaintiff were misled by the descriptions therein. It was obvious at the trial that the deed of itself was insensible, and without the aid of the stone pillar and piles of stones upon the ground, and of the actual possession, and of the surveys, could not convey title. Here there was a serious defect, and that casting suspicion on the title, and requiring extensive evidence on the trial, to enable plaintiff to get one.

The defendant, in his first plea, attacked the proceedings which I have already spoken of, and alleged that the said *Charles O. Hosterman* was still in possession of the lands and held the same adversely to the petitioner. The defendant's second plea is that the petitioner is not entitled, and ought not to have partition as prayed for, inasmuch as the application of the petitioner, if granted, would be nugatory and inoperative, and expose the defendant to costs and expenses. He prays, therefore, that the petition may be dismissed, and that defendant have his costs.

This second plea and the position it involves were urged upon the Court with great earnestness, and raise, for the first time, a very important point of practice. I have, therefore, given it an attentive consideration. We all know that at common law the remedy by writ of partition was confined to co-partners, and that it was extended by the statute of 31

*Henry VIII.*, ch. 4, to joint-tenants and tenants in common. Then gradually arose an equity jurisdiction, which was found so much more convenient and effectual that the writ at common law became obsolete, and now it has been abolished in *England* by the 3 & 4 *William IV.*, ch. 27. In this Province it still survives; it is recognized by the first section of chapter 139, and it has now and then been brought before the Court, as in *James' Rep.*, 328; but in practice, the mode pointed out in the *Revised Statutes* is the only one that is followed, and on the true construction of chapter 139 the question was raised. Not so in *England*, where they have no such practice, and a partition can be enforced only by bill in Equity.

The rule, as contended for by defendant's counsel, appears to have been settled at an early period. *Wilkin v. Wilkin*, 1 Johnson Ch. Rep., 117; *Phelps v. Green*, 3 Johns. Ch. Rep., 304. This position is taken in all the text books and upheld by numerous cases, and the reason given is that Courts of Equity would not usurp the rights of the Common Law Courts and the functions of a jury by trying questions of title.

The two cases decided in 1868-9 and cited at the argument from 7 *L. R. Eq.*, 296, recognize the same principle. In *Bolton v. Bolton* two wills were set up and *Sir Wm. Wood*, the Lord Chancellor, held that the one could not oust the other from a trial by a jury, and that the legal right must be tried before he came for a partition. And in *Slade v. Barlow*, Vice-Chancellor *James* declared that the suit for a partition is based on the assumption that there is no litigation. He retained the bill in that case, but the reason he did so was that the plaintiff might possibly turn out to be a tenant in common, and in that event the suit might be made available. It was never intended to alter the position of the parties in the common law proceedings. These two are the latest authorities, and they are decisive of the rule in the *English* Chancery, which has been adopted also by the Court in the State of *New York*; but it is obvious that they have only a partial application to our system based upon our own statute. That statute was borrowed almost word for word from chapter 103 of the *Revised Statutes of Massachusetts*, published in 1836, and founded upon acts passed in 1783 and 1785. The clauses which affect this question, particularly the 1st, 3rd

and 42nd sections of our act, are literally the same in both. It is of importance, therefore, to trace the decisions of the Courts of *Massachusetts* as far as we have access to them—and there is a blank in them which we are unable to fill up—upon this branch of the law. They are to be found in *Dane's Abridgment* to the date of its publication, chapters 191, 132, so far at least as anything is to be found that is worth the seeking in that learned and heterogenous compilation. I shall not attempt to do more than cite a few of the leading cases.

The operation of a sheriff's deed appears very distinctly from the case of *Poignard v. Smith*, 6 Pick., 175. We must assent, I think, to this doctrine—the common law rule—which we still adopt in this Court, though with some hesitation, that a man out of possession cannot legally convey, having no bearing upon a sale by a public officer, and transferring in payment of defendant's debt whatever right he may have, whether by legal holding or beneficiary interest in lands. Still less could the adverse possession of the judgment debtor be set up, as in this case, against a sheriff's sale, if legally conducted. On the point of seisin the *American* cases are not altogether reconcilable. In *Bonner v. Proprietors*, 7 Mass., 475, the lands of which partition was sought had been sold for non-payment of an assessment, and being in possession of the purchasers under that sale, (a case very distinguishable from the present), the plaintiffs in possession were non-suited, the Court observing that this process lies only for persons actually seised. This case was insisted on at the argument as decisive, there being no actual seisin in *LeCain*, but it cannot be pushed so far. It precludes a partition where there is an adverse possession in a third party, but not where there are contending claims arising out of a common title. Although, therefore, *Dane* states (ch. 191, art. 4, sec. 6) that *Bonner's* case is supported by the practice of the Court, it must be only in this qualified sense. *Barnard v. Pope*, 14 Mass., 434. I shall turn only to one other case—*Wells v. Prowse*, 9 Mass., 508. The same case is reported in 4 Mass., 64, where the claimant under a devise of lands was defeated. He obtained a verdict in *March* term, 1862, and in *March* term, 1863, the question arose upon that verdict,

whether his right of entry, if any he had, was not barred. This point was reserved upon his petition for a partition of the lands, and, being decided in his favor, the interlocutory judgment was entered *quod partitio fiat*.

We have no means of ascertaining the modern practice of *Massachusetts*, but these cases seem to establish the two positions contended for by the plaintiff, that a sheriff's deed, otherwise unassailable, gives sufficient seisin for a proceeding of partition, and that on the trial the title of the judgment debtor in this case, as of a tenant in common where the suit is between the immediate parties, may be investigated. I may add that this principle has been acted on in several cases within my own recollection, as in *Shea v. VanMoulder*, tried before me in *May*, 1868, where the legitimacy of the plaintiff came into question, and the verdict in his favor was accepted as conclusive after a full investigation at the trial. It is true that though the plaintiff should succeed in obtaining partition the defendant may still resist him, and an ejectment may be necessary for gaining an actual possession, thus necessitating two actions. But if the plaintiff were to succeed in ejectment or the defendant refuse to acknowledge his title or were unable to effect a division, a suit in partition must be brought equally necessitating two actions. Nor are the outstanding mortgages in the way, as was at first supposed. They would be a serious difficulty indeed, if the plaintiff were to bring ejectment with the legal title in the mortgagees. But in particular, by the 22nd section of the Act, a mortgage shall be concluded by the judgment so far as it respects the partition and the assignment of shares.

This brings us to the validity of the sheriff's deed. The technical objection, as I may call it, was the omission in the *Gazette* of a line in the description which was in the handbills and the sheriff's deed. It would be a harsh application of the law to defeat the title of a purchaser on so narrow a ground. This is not like the case of *Gillies v. Campbell*, James' R., 48, where the description in the deed contained land not included in the advertisement, or the case of *Crow v. Tolton*, decided in 1864, where the advertisement was inserted only twenty-eight days and there was no proof of the posting of the handbills. Here is a small and, as I think, a trivial

omission, which ought not to destroy title. On the remaining question of the errors in the description, I forbear from going into the cases which have been reviewed by two of my learned brethren. These errors I think, in view of the evidence, come within the maxim *fulsa demonstratio non nocet*. It is impossible to have a doubt of the property that was intended to be conveyed, and there being no such doubt, the law will not permit the grant to be frustrated by a mistake.

I am of opinion that on all these grounds the plaintiff should have judgment.

DESBARRES, J.—This is a writ of partition sued out by the petitioner, *John W. LeCain*, against *John E. Hosterman* and others, in which partition is prayed for of the undivided half part of a tract of land situate on the north side of the *North West Arm*, containing by estimation 2000 acres, which was devised to *Charles O. Hosterman* by his father, the late *Thomas Hosterman*, and sold by the sheriff of the county of *Halifax* under an execution against *Charles O. Hosterman* and another. The petitioner claims it as a purchaser at that sale, and under a deed executed to him by the sheriff on the 30th December, 1870, in which the land is described. The partition was resisted by *John E. Hosterman*, the other devisee, under his father's will, of the remaining half part of the lot, who pleaded to the action, two of the other persons sued, being mortgagees of *Charles O. Hosterman* and *John E. Hosterman* and the others, executors of the will of *Thomas Hosterman*, not having appeared. The case was tried before His Lordship the Chief Justice, and a verdict was entered for the plaintiff by consent, subject to the opinion of the Court on the law and evidence in the case, with power to enter a verdict for defendant.

Several grounds of objection were taken at the argument, the first of which arises out of errors in the description of the land sold under execution and conveyed, or intended to be conveyed, by the sheriff to the petitioner. The first error in representing the beginning boundary of the land to be on the shore of the *North West Arm*, at a stone marked  $\Delta$ , being the southern boundary of the admiralty property, whereas in point of fact it was and ought to be designated as the northern

boundary, and the second in describing the line running from the rear line as a line running southerly along the boundary of the admiralty property to the property of *Dr. Cogswell*, instead of a line running northerly to the property of *Dr. Cogswell*. With the exception of these two obvious mistakes, the property actually sold and conveyed is properly described, and the question is, whether these mistakes are to have the effect of vitiating the deed and making it a nullity. *Washburn*, in his *Treatise on Real Property*, goes very fully into the subject of descriptions in deeds, and mentions several cases which I think have a material bearing on the present. He says the object of the descriptive part of the grant is to define what the parties intend the one to convey and the other to receive, and he gives the rules which are to be applied in reading and construing deeds. At page 669, vol. 2, he says:—"When the parts of a description in a deed are found inconsistent with each other, the courts give effect to every part of a deed, if it is possible consistently with the rule of law, and if this cannot be done, then they examine and see if there is enough of the consistent and intelligible portion of the same to give effect to the intention; but if the repugnancy of the parts be such as to render the intention of the parties unintelligible, it defeats the grant itself. It has accordingly been held that when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain it, no estate will pass except such as agrees with every particular of the description. But if the description is sufficient to ascertain the estate, although the estate cannot agree with all the particulars of the description, yet it will pass." At page 670, he says: "Numerous illustrations might be given of the application of the foregoing rule," and remarks that the reader should be apprized of a maxim (*Broom's*, 490,) of pretty general application, *falsa demonstratio non nocet*, under which, if the instrument defines with convenient certainty what is intended to pass by it, a subsequent erroneous addition will not vitiate it. At page 672, he says: "Few cases more fully illustrate the principles of construction than that of *Worthington v. Hylyer*, 4 Mass., 196, where the grant was of "the farm," in W., on which the grantor lived, being lot No. 17, in the first division of lands, containing 100 acres,

with my dwelling-house standing thereon; bounding west on the lands of J. C., northerly by a pond, east of lot No. 18, south of lot No. 19, having a highway through it. Now in fact No. 17 had no house upon it, nor any road through it, and only a little part of it was clear or susceptible of cultivation, and was nearly worthless, and only answered to the description in that it was bounded by a pond. In fact the grantor's house stood upon another lot separated from No. 17 by No. 18 and a highway, and occupied by him as a farm; and the Court held that as it was obviously the intent of the parties to convey the farm and dwelling-house, this specific reference to No. 17 as a description of it was false, and must be rejected, and that the farm did pass." At page 674, he says: "It is a rule of universal application, that natural permanent objects called for in a deed control courses and distances given. The order of applying descriptions of boundaries is first to natural objects, second to artificial marks, and third to courses and distances given in the deed, and courses and distances given in the deed can be controlled only by monuments." The Court, he remarks, had occasion to lay down the rule to meet the case of a public grant where only three sides of the grant could be ascertained. *Shaw*, C. J., said: "A deed is not to be held void for uncertainty because the boundaries are not fully expressed, when by reasonable intendment it can be ascertained what was considered and understood by both parties to be embraced in the description. Now it may be asked what property was considered and understood to be embraced in the description contained in the advertisement and the deed executed by the sheriff to the petitioner. After describing the boundaries, which are all correct, with the exception of the errors to which I have already referred, the description concludes thus: "Being the whole of the property of the late *Thomas Hosterman*, situate on the west side of the *North West Arm*, containing by estimation 2000 acres more or less." No person looking at and carefully reading the advertisement could, it appears to me, have supposed that the property offered for sale was any other than the well known property of the late *Thomas Hosterman*. It could surely not have been taken to be the property, lying on the south, nor the *Dr. Cogswell*



property on the north of it. No person could, if he had considered but a moment, have supposed or believed that either the one or the other were to be sold under an execution. It was true that *Mr. Bremner*, a witness on the part of the defence, stated that on seeing the advertisement describing the property as being southerly of the admiralty property, he felt satisfied that the church and school-house, which he desired to protect, were not in the land advertised, but if he had carefully read the whole of the description, particularly the latter part of it, and observed that the whole of the property of the late *Thomas Hosterman* was to be sold, I am inclined to think he would have taken a different view. I am satisfied he stated the true impression made on his own mind from what he read, but as none of the forty persons who were present at the sale were examined, we have no means of knowing what their impressions were. It does not appear that any inquiry was made, or any doubts expressed at the sale as to the locality of the property offered for sale, a fact from which it may be presumed that all the bystanders and bidders well knew where it was situate, and therefore had the means of informing themselves as to its value. But we are now inquiring what was understood by the sheriff on the one hand as the seller, and the petitioner on the other as the purchaser, and also whether the errors pointed out in the description of the deed rendered it nugatory and void, or whether the deed, notwithstanding the errors, was sufficient to pass the title of *Charles O. Hosterman* in the property, for which partition is sought. I am of opinion that the title of *Charles O. Hosterman*, notwithstanding the errors in the description of the deed, did pass, there being enough in the consistent and true portions of the description to identify the property and give effect to the intention of the parties, and that what is false in the description may be rejected on the ground that *falsa demonstratio non nocet*.

Another objection was raised, viz., that the petitioner not having seizin in fact of the premises, partition did not lie, and in support of that position two cases among others were cited, to which I will now refer. The first is that of *Bonner v. The Proprietors of the Kennebec Purchase*, 7 Mass., 475, which was much relied upon at the argument as a case estab-

lishing this point. I have not been able to take the same view of it, as, it appears to me, the present is a very different case from that. There the purchasers of the land, under a sale for non-payment of an assessment, were in possession, and it was held that partition would only lie for a person who had a seizin in part, and the plaintiff was non-suited. Here, it is true, there is no actual possession in the petitioner *LeCain*, but there is no evidence to show that there is any person in possession other than *John E. Hosterman*, who, if *LeCain's* title be valid, as I take it to be, now a tenant in common with *LeCain* of this undivided property, must therefore be considered as holding as well for *LeCain* as himself. *LeCain* having, then, the same title that *Charles O. Hosterman* had, is in a very different position from what he would be if a stranger were in possession, and that fact, in my mind, makes an important distinction between the two cases, rendering that of *Bonner v. The Proprietors* of less weight than it otherwise would have had. The next case cited was that of *Rickard d. Rickard v. Rickard*, 13 Pick., 231; that, too, I think, is a case very distinguishable from this. In that a tract of land was granted with a dwelling-house thereon, in 1754, by *Samuel Rickard* to his sons *Theophilus* and *Lazarus* as tenants in common, the tract included a parcel of woodland of which partition was sought. *Lazarus* died two years afterwards without issue, and the petitioner for partition claimed as one of his heirs. *Theophilus* lived in the dwelling-house, and fenced and improved a part of the tract for twenty-nine years, when he died. All his estate was settled on his son, who occupied the house and land and died, having devised his land to the respondent, who also entered upon and occupied the land for a period which, including the previous possession of those under whom he claimed, extended for a period of forty years. It was held that there having been an ouster of *Lazarus's* heirs for forty years, the petition for a partition could not be maintained. I may here remark that if *John E. Hosterman* had been in possession of the land of which partition is now sought for the same length of time as against his brother *Charles O. Hosterman*, I would have no hesitation in holding that *LeCain* could not maintain partition now. I will only refer to another case, that of *Bradley*

v. *Fuller*, 23 Pick., 1, which I think sustains the view I have already expressed as to the petitioner's right as tenant in common with *John E. Hosterman* to maintain partition. In that case it was held that where two tenants in common of land have severally mortgaged their respective undivided right to the same person, one of them is entitled to partition as against the other, before entry by the mortgagee, but that such partition would not affect the rights of the mortgagee.

That case furnishes an answer to another objection, not yet noticed, viz., that the legal title being in the mortgagees partition would not lie. In reference to the objection last named I may remark that the mortgagee though summoned, has not appeared in this suit, or offered any resistance to the partition of the land, and so far as respects the share claimed by the petitioner it may be that he is content to be governed by the judgment of the Court, knowing that under section 42 of chapter 139, *Revised Statutes*, his lien will still remain in full force on that share as well as the other.

Having satisfied my mind, on full consideration, of the sufficiency of the description in the deed to identify the property, and that it was the intention to sell and convey to the petitioner *LeCain* all the property devised by the late *Thomas Hosterman* to his son *Charles O. Hosterman*, I am of opinion that all the title which the latter had therein passed under the sheriff's deed to *LeCain*, and that he is, therefore, entitled to the judgment of the Court.

WILKINS, J.—To decide who may maintain, or who may contest a petition for partition under our statute, we must have recourse not to rules of Equity governing proceedings in that Court to enforce partition, but to provisions of our own legislation. The governing principle in Equity is that partition is matter of right when the title is clear, but if the title be doubtful, the proceeding in that Court is at once arrested, seeing that the title must necessarily be first established at law; *Phelps v. Green*, 3 Johns., C. C., 304, our statute, however, whilst it gives a right to any person holding lands as joint-tenant, co-parcener, or tenant in common, to obtain partition either by writ of partition at Common Law, or in manner provided by chapter 139 (see sec. 1), supposes, and is

based upon a legislative position, that whether a petitioner is or is not entitled on any ground whatever to partition under its provisions may be the subject of an issue of law or of fact raised under a petition for partition preferred under the Act; *Barnard v. Pope*, 14 Mass., 435. By section 12 it is provided that any person interested in the premises may plead any matter tending to show that petitioner ought not to have partition as prayed for either in whole or part, and section 15 provides in terms for the trial of an issue of law or of fact, having for its object to determine whether petitioner is entitled to have partition as prayed for, and to give him judgment if found to be so entitled. Section 12 of the statute indicates how parties interested in the land of which partition is prayed for, whether summoned or not, shall appear and plead.

These being the general principles governing the case before us, let us see what the case is. The petition represents in effect (with the matters not material) that in *December*, 1868, he purchased at sheriff's sale, by deed executed after all statutable requirements had been observed, certain real estate according to a description set out in the petition, "being the undivided interest in the said estate of *Charles O. Hosterman*, held by him under devise from his father deceased, the same having been duly levied on and sold under an execution issued on a judgment obtained by *Gray* against the said *Hosterman* and a person by the name of *Cooper*." Representing *Cooper* to have no existing interest, the petition sets out the title of *Charles O. Hosterman* to have been by devise to him and his brother *John E. Hosterman* (the defendant), and their heirs, a devise of all the real estate, &c., owned by the testator on the west side of the *North West Arm*. The petitioner further alleges that the lands, &c., (of a portion whereof partition is prayed) were conveyed to the testator, and in the conveyance are described as in the petition, and that the land so described is the only land fronting on the water on the west side of the *North West Arm* which was owned or possessed by the said testator at the time of his decease. The petition further states that *Charles O.* and *John E. Hosterman* conveyed all their interest in the land by a mortgage, outstanding, to the *Hon. M. B. Almon*, and by the same description and

boundaries as in the sheriff's deed; and that *Charles O. Hosterman* by the same description, by mortgage also, notwithstanding, conveyed his individual interest to *Henry Pryor*, Esq. Petitioner then prays for a rule to enable him to hold his undivided moiety in severalty. *Almon*, the mortgagee, holding a mortgage over the whole property, prays that no proceeding may be had in this suit which will deprive him of his lien over the whole property. But he has not (see sec. 33 in connection with sec. 12) "answered the petition and pleaded a matter tending to show that the petitioner ought not to have partition as prayed for." Not having done so, his rights in severalty as mortgagee are passed. Had he so answered we must have argued whether in view of his plea plaintiff could have partition. Not having so answered, his lien over the whole property remains, and partition, if adjudged, must be subject to such lien. The statute (see sec. 33) grants his prayer, having anticipated it.

The defendant, *John E. Hosterman*, the only other defendant who appears, for his sole plea, pleads that the petitioner did not purchase the lands pursuant to notice, and other proceedings first had according to law, nor were the same duly levied on and sold on an execution under the judgment stated by petitioner; nor was a deed thereof made by the sheriff to the petitioner of the said lands; and the same defendant alleges, also, that *Charles O. Hosterman* is still in possession of the land; and holds the same adversely to the petitioner. He adds in general terms that the petition if granted will be nugatory and subject *John E. Hosterman* to costs. The effect of this, the only plea, (the rules governing which are of course the same with those that govern a plea in other actions) viewed in connection with the petition is, an admission by all the defendants that if the deed relied on be valid in respect of all the objections urged against it, and if the objection of adverse holding by *Charles O. Hosterman* be untenable, the petitioner is entitled to partition, as claimed by him. There could be no such adverse holding in the case, assuming the deed to be legal, for the possession of the co-tenant *John E. Hosterman* enured in law as the possession of the petitioner, and as there is no actual ouster, no turning out by the shoulders by *Charles O. Hosterman* in the case,

and no withholding of petitioner's moiety of the rents and profits, which alone could constitute a constructive ouster, there is no adverse possession ; see *Barnard v. Pope*, 14 Mass., 475. I find, indeed, in the minutes no evidence whatever that points to such. It is important, moreover, in this connection to bear in mind that *Charles O. Hosterman* has not thought proper to avail himself of the provisions of sections 13 and 14, and (though not named in the petition), to appear and plead as defendant, and himself contest petitioner's right to partition. Had he done so, the petitioner might, under those last mentioned provisions, have replied that *Charles O. Hosterman* had no estate or interest in the land, and prayed judgment if he should be permitted to object to the petition.

On what principle then shall *John Hosterman* be heard to maintain a plea for and on behalf of *Charles O. Hosterman* which *Charles O. Hosterman* has declined to plead for himself. It is thus apparent, also, that at the argument an objection was taken by *Mr. Thompson* that cannot be entertained, because no defendant has taken it as a ground of defence. That objection was, that the petitioner had not, in view of the outstanding mortgage, "an estate in possession," as required by the partition statute. It must be remarked, also, in this connection, that "an estate in possession" in the act referred to is plainly used in contradistinction from the other phrase occurring, viz., "being entitled only to a remainder or reversion." The Legislature has not required that the petitioner should be in actual possession of the estate in which partition is claimed, but merely "that he should have an estate in possession." Besides, if the want of such an estate be intended to be insisted on as a defence, it must be pleaded. But while a mortgagee of the share of a part-owner is concluded by the partition by the express provisions of section 40, a mortgagee of the whole premises may, under section 33, claim to hold in severalty, and by answer make such his holding a defensive ground why petitioner should not have partition, or elect, as *Mr. Almon* has done in this case, to waive his right so to oppose the partition.

Thus the enquiry at the trial was confined by the pleadings, as ours must be after the argument, to the only question in issue, viz., the petitioner's alleged right to have partition

under the sheriff's deed on which his title rests. The objections to that title are two-fold ; or, 1st, that the deed is void from uncertainty in the description ; 2nd, that though it is presumptive proof of title, that presumption is destroyed by evidence showing that the *Gazette* notice is at variance with the description in the deed and in the hand-bills.

As regards the second branch of the objections, which it will be convenient to consider first in order, it must be conceded that if the variance in question be of a substantial character, and such as had a tendency to mislead, or might have misled a person intending to bid or bidding at the sheriff's sale, it vitiates the deed, and renders it inoperative. For the protection of the judgment debtor whose lands are levied or under execution, more especially, and in a degree, also, from a regard to the interest of his creditor, certain formalities previous to selling are required by the Legislature to be observed by the sheriff and by the attorney of the plaintiff. Among these is publication for a prescribed time in the *Royal Gazette* newspaper of an advertisement containing a description of the lands directed to be levied on, stating that such lands have been taken in execution at the suit of the plaintiff against the defendant, the time and place fixed for such sale, and having appended thereto the name of the sheriff and of the attorney of the plaintiff. In relation to this the only objection taken is that (assuming the description in the deed sufficiently certain), the *Gazette* notice in proof so materially varies from it, that no legal *Gazette* notice of the intended sale was published. If, indeed, the description in the particular referred to must necessarily correspond verbatim with the description of the lands actually sold, there has certainly not been a compliance in that respect with the statutable requisition. The cases from 3 *Johnson's Reps.*, viz., *Jackson v. Boswell*, and *Jackson v. Delaney*, cited by *Mr. Thompson* on the point under consideration do not, however, go the length of requiring so strict a performance of what the Legislature has enacted, or of what in reason is demanded in such a case for the protection of parties interested. They merely decide, and most reasonably, that a sheriff's deed must be held void if the description be so general and undefined that it does not convey true and accu-

rate information of the particular land advertised to be sold. One of those cases decided that where the only descriptive words in a sheriff's deed were, "also all other the lands, tenements and hereditaments whereof the said *William*, Earl of Sterling was seized within the county of *Ulster*," the deed was inoperative. The other decided that where the only description in the deed from the sheriff was, "all the land of A B, the debtor in the *Hardenbrook* patent," extrinsically shown to comprise a very large tract of land owned by different persons, nothing passed by the document. The *New Brunswick* case cited from 3 *Allen* shows that the Supreme Court of that Province upheld a sheriff's deed of which the description was in these terms, viz., all the right and title of J. H. to the following lot or tract of land, viz., lot No. , situate at the mouth of the river *Oromocto*, in the parish of *Burton*, containing 350 acres more or less," and the Court sustained the deed, though assailed on the ground of uncertainty, no number of the lot being stated. *Mr. Thompson* contended that the ordinary rules of construction of deeds *inter partes* strictly, in case of latent ambiguity, could not be applied to deeds executed by a sheriff under the authority of a statute regulating sales by that officer of lands extended on under executions, but none of the authorities relied on by the learned counsel recognizes that distinction, and it appears to me to have no support from principle. In an ordinary case of construction of a deed the question for a Court is, when called upon to construe the descriptive part of the instrument, "What did the party who executed it intend to convey?" I conceive no reason why the same question should not be put in relation to a deed of debtor's land executed by a ministerial officer empowered to execute it, and who must be held to have intended to convey that portion of land which he was commanded by the law to levy on, and which under direction of a plaintiff in the execution, or his attorney, he did in fact levy on, and of which he inserts a description in the instrument that he executes. The law places that officer in the position of the judgment debtor, and the question of construction must be decided as it would have to be if the debtor had conveyed to the purchaser to satisfy the execution debt. The variance in question is as follows: In the deed in regard to



two of the consecutive bounds the language is, "Thence southerly along said shore to the place of beginning." In contrast with this the language of the *Gazette* notice is, "Thence north 87 degrees east along said *Cogswell* property to the shore of the *North West Arm*," (omitting "thence southerly along said shore") to the place of beginning." When both descriptions are read as they may, and as according to canons of construction they ought to be read, they are in accordance with clearly manifested intentions, and there is no discrepancy between them. For these canons, as I have ventured to call them, it can scarcely, in this day, be necessary to cite authorities. "That the intent of parties to a deed is to be effected if possible," and "that the well known maxim" *falsa demonstratio non nocet* "sanctions and even demands rejection of words," are clear principles. They are thus recognized by a great *American* jurist, the late Chief Justice *Parsons*, who in the case of *Worthington et al., Executors, &c., v. Hylyer et al.*, cited from 4 *Mass.*, says: "It seems to be a general rule that when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree to every particular of the description. Thus, if a man grant all his estate in his own occupation in the town of W, no estate can pass except what is in his own occupation, and is also situate in that town. But, if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. Thus, if a man convey 'his house in D, which was formerly B C's,' when it was not B C's but T C's, the house in D shall pass, if the grantor had but one house in D, because the description of his house in D, the estate intended to be conveyed, is sufficiently ascertained. See also *Taylor's Evid.*, § 1106." The following reading of the description in the deed before us will be found to be entirely in accordance with the principle of construction so judicially pronounced. As to the descriptive part of the deed, it must be premised that "the starting point" being at, and the first course along the *southern* boundary line of the admiralty property, and the second line

being stated thus, viz., "thence southerly along the boundary line of the admiralty first spoken of," a repugnancy in terms appears which creates a necessity for looking to the general intent in order to explain it. That general intent as gathered from the description as a whole is unmistakable. The description must be read thus, viz., "Beginning on the shore of the *North West Arm* at a stone marked  $\Delta$ ," (this is proved by *Hendry* to be, and to correspond on the ground,) "being the southern boundary of the admiralty property there situate: *First line*,—"Thence running south 58 west along the said admiralty property," (thus constituting a defined course,) "to a stone marked with the broad arrow." (Here is a monument and a *terminus ad quem*, which are proved by *Hendry* to be on the ground. The words that follow, viz., "on the rear line of the lot hereby conveyed," are *fulsa demonstratio*, and must be rejected. They are moreover superfluous and unnecessary. *Second line*,—"Thence" (*i. e.*, from the last mentioned stone), "*northerly*" (a word plainly intended, and necessary to be substituted for "*southerly*,") "along the boundary line of the admiralty property." (*i. e.*, by that western line extended along the line of the *Hosterman* property), "to property of *Dr. Cogswell*," (which *Hendry* proves will thus be reached). *Third line*,—"Thence" (*i. e.*, from corner of the *Cogswell* property), "north 87 east along said *Cogswell's* property to the shore of the *North West Arm*." *Fourth line*,—"Thence southerly along said shore to the place of beginning." There cannot be a doubt of the general intent, for these limits comprehend, (that they comprise other lands that could not be the subject of the conveyance is immaterial), a defined area of land, being the whole of the *Hosterman* property lying on the west of the *Arm*, and having boundaries plainly indicated in the description (read it as you may), viz. the *Cogswell* property on the north, the admiralty property on the south, the *Arm* on the east, the land abutting on the *Hosterman* property on the west.

The advertisement description in the hand-bills corresponds with that in the deed. The description in the *Gazette* notice differs from the two former in this particular only, viz., in the third line of the land mentioned in the *Gazette* notice these words are omitted, viz., "to the shore of the *North West Arm*,

thence southerly along the said shore." This variance is not substantial, for, as a consequence of it, nobody could be misled, or after reading the *Gazette* notice alone be ignorant of what was to be sold. Any man of ordinary intelligence, with the *Gazette* in his hand, would read the third line thus, viz., "Thence" (from the *Cogswell* corner), north 87 degrees east along said *Cogswell* property (*i. e.*, as far it extends), and that is "to the shore of the *North West Arm*." Arrived at the the end of that line, he would see from the description that he was to proceed "to the place of beginning." Looking at the land he could not fail to see that he could only reach that place of beginning by following out the shores of the public waters of the *Arm* southerly, until he arrived at it.) See the passage cited from *Washburn*.) Looking at the language of the *Gazette* notice, we perceive these are portions of it, viz., 1st, "being the whole of the property of the late *Thomas Hosterman*," and 2nd, "on the west side of the *North West Arm*." The petition alleges these to be facts in relation to the land in question, and the plea by not denying admits the truth of the allegation.

I am of opinion that the verdict taken at the trial for the petitioner must stand, and that he is entitled to a rule for partition, with costs, to be paid by *John E. Hosterman*.

MCCULLY, J.—This was a suit for partition brought by plaintiff, claiming to be a joint owner as tenant in common by purchase at sheriff's sale (in a suit of one *W. Myers Gray*, plaintiff, and *Charles O. Hosterman*, and *W. Y. Cooper*, defendants), of certain undivided real estate devised by one *Thomas Hosterman* to the defendant *John E. Hosterman* and the said *C. O. Hosterman*, situate on the west side of the *North West Arm* in the County of *Halifax*, described as lot No. 1.

At the close of plaintiff's case, two principal objections were taken on the part of defendant as grounds of nonsuit, 1st, that a party out of possession cannot maintain partition against a party in possession; 2nd, that the sheriff's deed, upon which plaintiff relies, passed nothing—there being an outstanding mortgage at the time of the judgment upon which the sheriff's deed is based, and owing to defects in the

advertisement in the *Gazette* and handbills, and discrepancies, and owing also to a defective and void description in the sheriff's deed. The nonsuit was refused by his Lordship the Chief Justice, who tried the cause, and "a verdict entered by consent for plaintiff, with power to the Court to enter a verdict for defendant, after argument, and no inference to be drawn either way from the present verdict, the whole evidence and law being submitted to the Court." The writ of partition was originally a proceeding at common law, (*Co. Lit.*, sec. 241,) to compel division as between co-partners, though not available for tenants in common. See sec. 318. The writ of partition of law being abolished in *England* by the stat. 30 *Wm. IV.*, ch. 27 & 36, Equity now has exclusive jurisdiction there. Not so here, however. For not only is the Common Law of *England* and its remedy by partition as well as the 31 & 32 *Hen. VIII.* in full force, but chapter 139, *Revised Statutes*, (3rd Series,) has come to the rescue and given to the Court of Law of *Nova Scotia* many if not all the aids which Courts of Equity in *England* had by degrees, and after a long series of years, acquired and practised in order to furnish an effective, simple, cheap remedy for dividing lands not only among co-parceners and joint-tenants but tenants in common as well. This chapter "*Of the partition of Lands*," became law in *Nova Scotia* for the first time on the revision of the *Revised Statutes* in 1851, and was transcribed almost *verbatim* (*mutatis mutandis*) from the *Revised Statutes of Massachusetts*, chapter 103, consolidated and first published in 1836. An excellent *resumé* of the history of the writ of partition and its application, distinguishing its equitable remedial powers from those purely legal, as they existed at Common Law, may be consulted with much benefit by referring to *Story's Equity Jurisprudence*, 10 ed., ch. 14. In *Whalley v. Damson*, 2 Sch. & Lef., 371-2, Lord *Redsdale* puts the distinction as between the two jurisdictions clearly. He there says: "Partition at Law, and Equity, are different things. The first operates by the judgment of the Court of Law and delivering up possession in pursuance of it, which concludes all the parties to it. Partition in Equity proceeds upon conveyances to be granted by the parties, and if the parties be not competent to execute the conveyances, the partition can-

not be effectually had." Section 22 of chapter 139, *Revised Statutes*, by chapter 16 of the Acts of 1866 was amended so as to enable the Court to order a sale in certain cases, and in 1867, by chapter 15, the amendment was extended to lands of testate as well as intestate estates. The jurisdiction of our Courts of Law is therefore now most comprehensive, possessing this distinguished advantage, pointed out by Lord *Rededale*, over the Equity Courts, that possession is delivered up in pursuance of their judgment, whereas in Equity, in cases of infancy, the infant was entitled to a day after attaining full age to shew cause against the decree, remedied now, however, in *England* by *Imperial Statutes*, 13 & 14 *Vic.*, ch. 60; and see *Bowra v. Wright*, 3 *Eng. L. & E.*, 190.

It was asserted on the trial and urged at the argument that a party out of possession cannot maintain partition against a party in possession. But unless there has been an actual *ouster* every tenant in common is, in the contemplation of law, equally in possession as his co-tenant. So well is this principle settled, that one tenant in common cannot sustain ejectment against a co-tenant unless an actual ouster or something equivalent be first established. Section 149 of chapter 134 (*Practice Act*), *Revised Statutes*, copying the *Com. Law Pro. Act*, in this respect, fully concedes the position. It is true indeed that section 3 of chapter 139 provides that "such petition," (being the substitute for a writ of summons,) "may be maintained by any person who has an estate in possession but not by one who is entitled only to a remainder or reversion." The clause does not, however, require that the claimant should have the lands or any portion of them in corporeal possession, but merely "*an estate in possession*," as contradistinguished from an estate in reversion. *Barnard v. Pope*, 14 *Mass.*, 434, is a good authority on the point, and if, in the present instance, *LeCain* is possessed of the estate of *C. O. Hosterman* under the sheriff's deed, as there can be no adverse possession by one tenant in common against another, as already intimated, without an ouster, I have no doubt that *LeCain* has precisely the same *locus standi* in this Court to maintain the present action, that *C. O. Hosterman* would have had previous to sheriff's deed. I have not hitherto noticed the fact that *Cooper's* name is mentioned as a defend

ant in *Gray's* judgment, because it was conceded that he had no estate in the land sought to be divided. But a most important inquiry now presents itself, and it is this: "Was the sheriff's deed under *Gray's* judgment valid to convey to *LeCain* the estate of *Chas. O. Hosterman*? If not this action must fail. The objections to the deed are, 1st, there is a discrepancy between the description of the lands therein set forth and the *Royal Gazette's* description of the lands advertized; 2nd, the description in the deed as well as that contained in the handbills, is defective, and the sheriff's deed is therefore imperative to convey the lands in question. The description contained in the deed and set out in plaintiff's petition, as also that in the *Royal Gazette* and hand-bills commence thus: "All the undivided half part of all that lot of land situate on the west side of the North West Arm in the County of *Halifax*, aforesaid. Then follows a particular description by corner distances, so faulty as to render it entirely inapplicable to the locus. It begins wrong,—starting at the shore of the said North West Arm at a stone marked with a broad arrow, being the southern (intended probably to be the northern) boundary of the Admiralty property, after running thence south 58 degrees west to the rear of the Admiralty lot; the description is thence southerly along the boundary line of the Admiralty property, &c., &c., whereas, to follow the rear line of the Admiralty property at all the course, as admitted, must have been northerly. No ingenuity of man can, I think, construe this particular description so as to make it include the locus sought to be divided. The concluding portion of it is as follows: "Being all the estate, right, title and interest of the said *C. O. Hosterman* (and *Mr. Cooper*), or either of them, in, to and out of the lands and premises aforesaid, with the hereditaments and appurtenances thereto belonging, being the whole of the property of the late *Thomas Hosterman*, situate on the west side of the North West Arm, and containing, by estimation, 2000 acres, more or less, together with the right of the said *C. O. Hosterman* to the water lot in front thereof." The discrepancy between the *Royal Gazette* and the deed and handbills consists in this, that the closing language of what I have designated the particular description as given in the deed and handbills, contains these

words: "to the shore of the North West Arm, thence southerly along said shore" (to the place of beginning.) In the *Royal Gazette* these words were omitted. Some doubt arose whether the defendant's counsel produced the *Gazette* in evidence showing this discrepancy, but I assume that he did for the purpose of the present judgment, and gave him the benefit of the doubt.

Under the foregoing circumstances, unless the plaintiff can succeed by virtue of the general words contained in the deeds, the *Gazette* and the handbills, and they are alike in all, striking out and abandoning the particular description altogether, and treating it as if it were not in existence, I am of opinion that he cannot succeed at all in the action. But if the general description is ample without extraneous aid, and sufficiently designates the property to be divided, then I am of opinion that he is entitled to the judgment sought. It is said that the plaintiff claims by a statutory title, and he must therefore shew that the requisites of the statutory law have been strictly complied with. Be it so. But it was well said by Ch. *Story*, sec. 646 *Equit. Jurisp.*, "that at least one half of the law which is at present, by way of distinction, called the Common Law and regulates the rights of property and the operation of contracts and especially commercial contracts, has had its origin since the reign of Queen *Elizabeth*," and not only does an old statute give place to a new one, but when the Common Law and the statute differ the Common Law gives place to the statute, if expressed in negative terms. *Broom's Max.*, sec. 34. Chapter 115, *Revised Statutes*, provides for the sale of lands to satisfy execution debts, and, by section 11 it is enacted "that the sheriff's deed shall be presumptive evidence of the defendant's title having been thereby conveyed to the purchasers." If the general description of the lands in question shall be found to be such as would have been sufficient as between grantor and grantee on a conveyance at Common Law, or rather, perhaps, under the *Statute of Uses*, to have conveyed the premises, I am of opinion, for I can find no decision to the contrary, that it is equally valid and effective in a case like the present, where the statute clothes the sheriff with the power to convey.

The circumstance that there was a mortgage, and a mortgage outstanding would be no valid reason in Equity why there should not be a partition, and chapter 139 *Revised Statutes*, having given this Court all, or nearly all the powers of a Court of Equity, evidently contemplates cases of outstanding paramount titles in sections 41 and 42 of that chapter, and provides for these cases accordingly. This now leaves but the simple point to be disposed of: is the description in the deed such as complies with the requisitions of the law to convey real estate as between party and party? If it is, then I hold that it is equally effective in a case like the present. *Utile per inutile non vitiatur*. Broom on the *Interpretation of Deeds*, section 603, in his readings on this maxim, says: "Accordingly where words of known signification are so placed in the context of a deed, that they make it repugnant and senseless, they are to be rejected equally with words of no signification," citing *Vaugh Rep.*, 176, and *Whittom v. Lamb*, 12 M. & W., 813, at section 606. Under the maxim demonstrated *non nocet*, the same author says: "As soon as there is an adequate and sufficient definition, with convenient certainty of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it." *Quicquid demonstratae rei additio, satis demonstratae, frustra est*, and all the cases, especially the most modern, are there cited. *Patterson, J.*, in *Doe dem. Hubbard v. Hubbard*, 13 Q. B., 241, says, "that the words exclusive of the *falsa demonstratio*, must be sufficient of themselves to describe the property, reference being had, if necessary to the situation of the premises, to the names by which they have been known, or to other circumstances properly pointing to the meaning of the description," (in that case), "of the will," here, of course, in the deed. In section 613, quoting Lord Bacon's illustration of this maxim, and in the language of that eminent jurist, Broom says: "If I grant my close called *Dale*, in the Parish of *Hurst* in the County of *Southampton*, and the parish extends into the County of *Berks*, and the whole close of *Dale* lies in fact in the last mentioned county, yet this false addition will not invalidate the grant." See *Anstee v. Nelms*, 1 H. & N., 225 and other cases there cited, and *Northington v. Mulgia*, 4 Mass., 205, to same effect.



Under these authorities, after grave and deliberate consideration, I am of opinion that the plaintiff *LeCain* is entitled to maintain the action of partition, and that under that portion of the description contained in his deed with which the *Royal Gazette* and handbills agree, commencing thus: "All the undivided half part of all that lot of land situate on the western side of the North West Arm in the County of *Halifax*," ending thus: "being the whole of the property of the late *Thomas Hosterman*, situate on the west side of the North West Arm, and containing, by estimation, 2000 acres, more or less, together with the right of the said *C. O. Hosterman* to the water lot in front thereof." Rejecting the repugnant and senseless portion of description intervening, the premises are sufficiently described to make the sheriff's deed effective, and the verdict for the plaintiff, therefore, should stand. The case cited by defendant's counsel, 3 *John, C. C.*, 304, was a case in Equity in *New York*, and where no such statutory remedy as that in *Massachusetts* and with us exists. The case of 7 *Mass. Reps.*, 475, is referred to in 11 *Mass.*, 434, and doubted if not overruled 13 *John*, 102 and 536, is a very different kind of description from that in the present case. The description there was, "all estates in certain patents and elsewhere wheresoever and whatsoever," and I have been unable to find authority beyond the doctrine of *Yates, J.*, to sustain the observation he there made, "that a party consuant of his rights may sell or mortgage by general description through an officer, and must define what he sells, and I observe that the learned reporter in the marginal notes qualifies the doctrine by his phraseology: "*It seems that.*" In the absence of any *English* or any *American* authority for such a position, I am not prepared to accept it as binding on this Court. I am of opinion that plaintiff is entitled to a rule for partition.

## THE BANK OF NOVA SCOTIA v. CHIPMAN.

Is an action on a promissory note defendant pleaded several pleas none of which denied the making or endorsing of the note, or asserted its invalidity in relation to the Stamp Acts. At the trial, before the case was opened, he moved for leave to add pleas under the Stamp Act, asserting in his affidavit that on the morning of the trial he had discovered that the stamps upon the note had not been duly obliterated according to the provisions of the statute, a defect of which he had not been previously aware. The presiding Judge refused his application, subject to the opinion of the Court.

*Held*, that the judicial discretion had been properly exercised, because *firstly*, the discovery of the alleged defect in the instrument might have been obtained by due diligence before the trial; and *secondly* and especially, because the real question in controversy between the parties, which they both came prepared to try had no relation whatever to the validity of the note under the Stamp Acts. The principle governing the exercise of judicial discretion in relation to allowing amendments is, not to permit them to be made where the effect will be to substitute a question for trial which is substantially different from that which the parties came prepared to try.

Although a proper amendment cannot be refused at the trial when circumstances during its progress unexpectedly manifest a necessity for such amendment, principle and convenience alike demand that such a motion should not be entertained in any case during the trial, where, by observing due diligence, leave to amend might have been obtained at an antecedent period.

The note having been read in evidence at the instance and on the motion of defendant's counsel,

*Held*, that he was thereby estopped from denying its validity.

The plaintiffs, as soon as the defect in the note was discovered, affixed stamps of double the proper value to it in open Court.

*Held*, WILKINS, J., *dissentiente*, that under section 12 of chapter 9 of the Dominion Act of 1867 they had satisfied the regulations of the statute.

WILKINS, J., now, (December 5th, 1871,) delivered the judgment of the Court:—

The plaintiffs in their writ alleged that the defendant, on the 14th of *January*, 1869, by his promissory note overdue at the commencement of the suit, promised to pay to his own order \$1994.32, three months after date of the note, and that defendant indorsed the same to one *Wm. Hare*, who indorsed same to the plaintiffs, but that defendant did not pay the same. To this the defendant pleaded several pleas not material to the subject of the present inquiry, but did not plead any plea whereby he denied the making or the indorsing of the note, or asserted its invalidity in relation to the *Stamp Acts*. The cause, then, came on for trial with an implied admission on the record that that note set out in the writ had been drawn and endorsed as stated in the writ.

At the trial in *May*, 1870, the defendant's counsel, before the case was opened, as it was by defendant's counsel, to whom the right to begin was conceded, moved the learned Chief Justice for leave to add pleas under the *Stamp Act*.

This motion (which had been preceded by an ineffectual motion, made without affidavit, for leave to add a plea denying the making of the note), was founded on an affidavit of the defendant, "that in consequence of information received by him he had on the morning of the trial asked for and obtained inspection of the note, and that it appeared that no obliteration, date, or other writing or marking was on the stamps, upon it, and that it was not stamped according to law. The affidavit further stated that neither defendant, nor his attorney, nor his counsel, was previously aware of the want of a proper stamp. The learned Chief Justice refused the application, subject to the opinion of the Court. I am of opinion that the discretion of His Lordship was thus properly exercised, for, in the first place, it is evident that the discovery of the alleged defect in the instrument might have been obtained by due diligence, and the application might therefore have been made before the trial; and secondly and especially, because the real question in controversy between the parties, which they both came prepared to try, (as is shown by the pleadings) had no relation whatever to the validity or invalidity of the note under the *Stamp Acts*, or to anything that could appear from inspection of the instrument itself. It is a fixed principle, governing the exercise of judicial discretion in *England* in relation to allowing amendments, not to permit them to be made where the effect will be to substitute a question for trial which is substantially different from that which the parties came prepared to try; *Ritchie et al. v. VanGelder*, 9 Exch., 762, illustrates sufficiently a class of *English* cases establishing this. *Alderson, B.*, says: "The statute recites that the power of amendment now invested in the Courts and the Judges thereof, is insufficient to enable them to prevent the failure of justice by reason of objections and mistakes of form, and it then provides a remedy. The meaning of the enactment is, that where the proceedings are informal, so as not to raise the question which the parties intended to try, the Court or Judge must amend them. Here the question in controversy between the parties is whether the defendant owes the plaintiffs the money which they claim, and that question is clearly and satisfactorily raised by the pleadings. But then it is re-opened to substi-

tute another plea in order to raise some other question, that is a matter entirely in our discretion; and I think we ought not in this case to allow it; *Wilkin v. Reid*, 15 C. B., 192, and *Lucas v. Tarleton*, 3 H. & N., 116, are to the same effect.

Had the amendment asked for been unobjectional in its character, we have already intimated that the motion for it should have been previously made. We think that although of course a proper amendment cannot be refused at a trial where circumstances during its progress unexpectedly and by surprise manifest a necessity for such amendment, principle and convenience, nevertheless, alike demand that such a motion should not be entertained in any case during the trial, where, by observing due diligence, leave to amend might have been obtained from the Court or a Judge at an antecedent period.

The trial proceeded, and *Mr. McDonald*, after he had opened the case for the defendant, required production of the note under proved notice, and it was produced. *Mr. Ritchie* called as a witness, being asked "if all the stamps on the note at the time when he was interrogated were on it when the jury were sworn," answered "that the six twenty-cent stamps were affixed on the morning when the difficulty arose." The legal effect of this act was made a point at the argument, but in the view I take of the general question, it is unnecessary to consider it.

At this stage of the trial, the defendant's counsel, with full knowledge of the defect in the instrument, took a step fraught, as it will appear, with consequences fatal to the position which he proceeded to assume when he moved for a nonsuit, on the ground "that the note was not stamped according to law." The learned counsel probably thought then, as he was understood to insist at the argument, that a promissory note, if not stamped according to law, was therefore so absolutely void that a court or a Judge before whom it appeared, under any circumstances, and irrespective of the pleas or acts of the parties in the cause, would be bound to treat it as an absolute nullity. But such is not the effect of the statute in question. The language of *English* acts for the imposition of stamps has from the earliest period of such legislation been quite as strong as, indeed stronger than that

our own *Dominion* statute. The words of 3 *W. & M.*, chap. 21, are, "provided that no instrument requiring a stamp shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful or available in law or equity until as well the duty as the penalty shall be paid," &c., "and the instrument," &c. The language of the *English* act, 31 *Geo. III.*, chap. 25, sec. 19, on which the decisions in *Jones v. Ryder*, 4 *M. & W.*, 32, and more of the modern cases on stamps in relation to bills of exchange and promissory notes turn, is, "No promissory notes shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful or available in law or equity unless the same be duly stamped." The language of the *Dominion* Act of 1867, chap. 9, sec. 11, is, as respects the invalidating effect of non-compliance with the provisions of the statute, "Such instrument shall be invalid, and of no effect in law or equity." It does not contain express words prohibiting the reception of such an instrument in evidence. It was decided in *Goodright v. Gregory*, *Laff.*, 339, (a reporter, indeed, of no very high reputation,) "that the want of a stamp does not avoid a document, it only prevents its being pleaded in evidence." An unstamped promissory note cannot, of course, "be read in evidence (*in invitum* against a party who, in respect of pleading, is in a position to object, and does object to its being read,) when the validity of the note is *directly* in issue; but as regards matters not material to that issue, the objection has been held to be unavailing" In *Gregory v. Fraser*, 3 *Camp.*, 454, which was an action for money lent, it was held by Lord *Ellenborough*, "that although a promissory note without a stamp cannot be read in evidence as a security, or prove the loan of money, it may be looked at by the jury with a view to ascertain a collateral fact." It was also decided by Lord *Ellenborough* (and his view at *nisi prius* was approved of by the Court *in banc*), "that the defendant is precluded from taking the objection that the bill sued on *and produced*, is not properly stamped, by the payment of money into Court, because it admits the validity of the instrument." The note thus produced was seen by the Court to be insufficiently stamped, and yet the Court refused to regard it as invalid, because the defendant had treated it as a valid

instrument; *Israel v. Benjamin*, 3 Camp., 40. In *Watson v. Glovers*, 7 Jurist, 68; Fish, 1152. the plaintiff sued on a note, and defendant, the maker, suffered default, and writ of inquiry issued. On the trial it was found that the note was insufficiently stamped, and the under-sheriff kept it from the jury. The Court refused a rule to set aside a verdict for the plaintiff, although no doubt the verdict proceeded on the evidence of the note. *Smart v. Noakes*, 6 M. & G., 911, was an action for a debt, to which defendant pleaded never indebted and payment. The plaintiff gave in evidence a memorandum in which the defendant admitted the debt; but the inference arising therefrom was that the debt had been paid by a bill granted at the time to the plaintiff by the defendant. *Held*, that the plaintiff might, in order to rebut that inference, and negative by anticipation the plea of payment, give in evidence the bill referred to, though on an insufficient stamp.

In the case before us the note in question (assuming it to be defectively stamped, or irregularly and illegally stamped as it appeared when the notice for a non-suit was made,) was doubly admitted to be valid by the defendant, first, because neither the drawing nor the endorsing was denied, and secondly, because it was actually *read in evidence* at the instance and on the motion of the counsel for the defendant. Unquestionably that act of the defendant's counsel must be regarded as quite as strong in its estopping character (the learned counsel having positive evidence of the statutable defect, if it existed), as was the paying of money into court by the defendant in the case before Lord *Ellenborough*, in which the defendant may have been ignorant of the defect. In *Fraser v. Wagner*, a note of which will be found at page 116 of *Field v. Woods*, 7 Ad. & El., 114, the instrument and agreement (defective under the *Stamp Act*) was read, through mere inadvertence of counsel, yet the Court held that the objection of invalidity came too late after the document had been read. In that case Lord *Denman* used these words, very suggestive here: "There is no reason to regret that by an accident such an instrument should have got on the Judge's notes." His Lordship probably considered that the policy of the Legislature was adequately protected by the

imposition of penalties. *Robinson v. Lord Vernon*, 6 C. B. (N.S.), 238, is a very strong case on the point of inquiry. It decides that the principle to be collected from all the cases there decided is, that the objection for want of a stamp ought to be taken at the earliest possible moment, so that the time of the court shall not be wasted by protracting an inquiry which may at any time be rendered futile by such objection. It affirms also the principle that the objection at the trial comes too late after the instrument has been read. In *Thynol v. Protherve*, 7 M. & S., 553, the plaintiff unnecessarily produced (and it was under notice to produce) letters of administration,—unnecessarily, because they were not denied by the pleadings. When produced, however, they appeared to be defectively stamped under 9 & 10 Wm. III., chap. 25, and 48 Geo. III., chap. 149, sec. 8, and thereupon plaintiff was non-suited, just as *Mr. McDonald* moved to non-suit the plaintiff here. A rule to set aside the non-suit was made absolute, and the Court said: "In this case upon the general issue the plaintiff had no occasion to produce the letters of administration at all, for the plea admitted he was administrator, and therefore the defendant had no right to insist upon the production." The language of Lord *Eldon* in *Huddleston v. Briscoe*, 11 Ves., 595, is very pertinent. His Lordship there says: "Whenever an action at law has been brought upon an agreement that ought to be upon a stamp, and the form of pleading has been such that at the trial it was admitted on the record, and the trial was" (as it is in this case) "on issues collateral to the existence of the agreement, and put the plaintiff in possession of the power of reading the bill and answer, the instrument has never been produced, and the Court never examines whether it was stamped, but leaves the parties liable to penalties, except in cases where the Legislature requires an instrument stamped as the only evidence of the transaction, and says expressly that otherwise the instrument shall not be read in evidence. "I do not know," his Lordship adds, "that even that clause makes the production of the stamp necessary, where the transaction is not in issue: for instance, where in a suit by an executor for an account, if the defendant admits that a legacy has been paid, though the Legislature imposes the necessity of a receipt,

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the Court would not inquire in such a suit whether such a receipt actually passed. In this view of the case, by analogy to the practice of the Court in other cases, and of Courts of Law, if the party has admitted that, which, if not admitted the plaintiff must prove, it cannot be necessary to produce that evidence which otherwise he must have brought forward." It is clear, then, from the authorities, that notwithstanding the strong nullifying words which occur in the *English Stamp Act*, and in ours, in relation to instruments required to be stamped, it is only where such instruments are directly in issue by the pleadings, and when offered as evidence, are objected to on account of legal invalidity apparent on the face of them, that they must be rejected as invalid, and so kept from the consideration of the jury. As a consequence of this I am of opinion that the rule must be discharged.

\* SIR WILLIAM YOUNG, C. J.—The principal question at the argument of the rule in this case was the validity of the stamps upon the note. The question of usury raised by the defendant was disposed of by the verdict, and, in the view I take, it is unnecessary to enquire into the propriety of the refusal to amend the defendant's pleas at the trial, or the necessity of pleading a defence under the *Stamp Act* of 1867. Two stamps of the value required by that Act were affixed to the note when made by the defendant, but he omitted to obliterate them in any of the modes prescribed by the fourth section. In that state the note was handed with the defendant's indorsement to *Mr. Hare*, and was indorsed by *Mr. Hare* in blank and discounted with the plaintiffs. The names of the defendant and *Mr. Hare* are the only two upon the note, and the first question is: are the plaintiffs as the bankers who discounted the note, and were the holders, when the action was brought, to be accounted parties to it? The 12th section of the *Dominion Act* of 1867, chapter 9, enacts that no party to or holder of any promissory note shall incur any penalty by reason of the duty thereon not having been paid at the

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\* *NOTE*.—After *WILKINS, J.*, had delivered his opinion, in which all the other Judges concurred, *YOUNG, C. J.*, delivered the following opinion on the stamping question, depending on the construction of the 12th section of the 9th chapter *Dominion Act*, 1867, in which also the other Judges concurred, except *WILKINS, J.*, who delivered on that point the dissentient opinion herewith subjoined.



proper time and by the proper party, on certain conditions in the section ; and any holder of such instrument may pay the duty thereon and give it validity under section 11 of the Act, without becoming a party thereto, thus clearly recognizing a distinction between the holder of a note and a party to it.

The present action having been brought before the repeal of sections 11 and 12, must be governed by them, and to illustrate the sense of the Legislature, we may refer to the repealing Act of 1870, chapter 13, where the distinction between the party to and the holder of a promissory note draft, or bill of exchange, is fully preserved.

*Chitty*, in his *Treatise on Bills*, (12th American from the 7th London edition,) p. 27, says, that with respect to the mode of becoming a party to any one of these instruments, it is a general rule, that no person can be considered as a party to a bill, unless his name, or the name of the firm of which he is a partner, appear on some part of it, and he cites several authorities which, though not in the same words, are to the same purport. I think, therefore, that the *Bank of Nova Scotia* was not a party to this note. But there is no question that the Bank was the holder of it. This is a general word applied to any one in actual or constructive possession of a bill, and entitled at law to recover or receive its contents from the parties to it. *Byles on Bills*, 2, and cases there cited. The note in question might have passed, on the blank endorsement of *Mr. Hare*, through twenty hands, each of whom, if possessed of it *bona fide* might have brought action on it as holder without becoming a party to it.

Is there any difference, then, between the obligations imposed on the party to a note and the holder of it by the 11th and 12th sections of chapter 9. It was strongly urged upon us by the plaintiff's counsel at the argument that there was such a difference, and, on an attentive consideration of the Act, I am disposed to acquiesce in that view. Sub-sections 1st and 2nd of section 4 direct the modes of obliteration of an adhesive stamp when used, and the 3rd sub-section enacts that if none of these modes are observed the adhesive stamp shall be of no avail. The duty, then, is not paid if the obliteration be neglected or omitted as was the case here. The 11th section provides that if any person takes a promissory

note before the duty has been paid by affixing thereto the proper stamp or stamps (which we may assume, I think, to mean, although it is not clearly expressed, stamps of the proper value duly obliterated), such person shall incur a penalty, and, unless a double duty is paid, "such instrument shall be invalid and of no effect in law or equity, except that any subsequent party to such instrument or party paying the same may, *at the time* of his so paying or becoming a party thereto, pay such double duty" in the manner prescribed in the section.

Now, if the view I have taken be the correct one, the Bank has neither paid nor become a party to this note, and the obligation to pay the double duty *at the time* of either paying or becoming a party does not attach. In point of fact, the Bank, through their counsel, when the defect in the stamps was discovered, and, in the words of the Judge's report, "the difficulty arose at the trial," affixed stamps of double the proper value to the note in open Court, and the question now is, could this be legally done by a holder under the 12th section? It provides, as I have already said, that no party to or holder of any promissory note, draft, or bill of exchange shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party or parties, provided that at the time it came into his hands it had affixed to it (not proper stamps, as in section 11, but) stamps to the amount of the duty apparently payable upon it (which was the case with this note)—that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double duty or additional duty as soon as he acquires such knowledge—and any holder of such instrument may pay the duty thereon and give it validity under section 11, without becoming a party thereto. It may be said that the object of this clause was to protect the holder of a note having stamps to the amount of the apparent duty, but the duty not having been paid at the proper time and by the proper parties, and that it does not extend to the holder of a note having the proper stamps affixed at the proper time and by the proper parties, but not duly obliterated. The answer is, that under the 4th section the duty is not paid unless the stamps of the

proper amount are not only affixed but obliterated. When not obliterated, the duty has not been paid at the proper time, and the holder comes within the protection of section 12, if the conditions of the section, as in this case, have been complied with. To exclude a *bond fide* holder under these circumstances, would be straining to the utmost an enactment which, in the interests of commerce and for the ends of justice, should be fairly but liberally construed. On the best consideration I can give to a somewhat obscure subject, requiring a close analysis and a regard to every distinction, I am of opinion that the plaintiffs have brought themselves within the requisitions of the Act, and are entitled to our judgment.

I should add that the objection taken to the mode of cancelling the six added stamps cannot prevail. Each of them is marked 19/5/70, which is recognized by mercantile and social usage as equivalent to 19th *May*, '70, which is also written across the six, being the day of the trial when they were affixed.

WILKINS, J.—I am unable to concur in the view of the construction of section 12 of chapter 9 which has just been expressed. The words on which the question turns are "as soon as he acquires such knowledge." The Bank of *Nova Scotia* had knowledge that the stamps affixed to the note (being, it is true, of the proper amount) were not affixed at the proper time and by the proper parties at the moment when the note came into its hands. It, then, had by inspection the means of such knowledge, viz., the state of the stamps then presented to its eyes, had it used them (inasmuch as it was apparent on the face of the note), that very negative evidence which is specified in the 3rd paragraph of section 4, "that they had not been affixed at the proper time, and by the proper party." Section 11, at its close, makes such phenomena *prima facie* evidence, even in an action for the penalty that the party prosecuted knew that the stamps were not so affixed. The very object of paragraph 1 of section 4 is, that the instrument may carry on its face evidence that the stamps were affixed by the maker, or drawer, or acceptor, or first indorser, and at the time when he assumed that

character in relation to the note. This note not having on its face that evidence, the Bank must be held to have acquired such knowledge *eo instante* that it became holder of the note. At that time only then could the holder pay the duty, and validate the instrument.

If the Bank, having such knowledge, could defer to pay the duty on a note thus defectively stamped, until a necessity for giving the note in evidence on the trial of an action brought to coerce payment, rendered it expedient to pay the duty, as prescribed by the act, the plain policy of the Legislature would be contravened. That policy is plainly very different from that which distinguishes Imperial legislation in the subject matter. On what principle could the morning of the trial when these stamps were affixed be fixed upon rather than any and every previous moment, of holding the note as the time when the Bank first acquired such knowledge. The trial took place in *May*, 1870; the writ issued as far back as 26th *April*, 1869. During that period the plaintiff was the holder of the note in question.

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### HUTCHINSON v. DILL, EXECUTOR.

To an action on a promissory note defendant pleaded usury. The note was expressed to be for the sum of £40, but the evidence went to show that defendant actually received only £38, although he paid interest upon the larger amount for the space of two years.

*Held*, that the transaction was usurious and that plaintiff could not recover.

DODD, J., now, (December 30th, 1871,) delivered judgment as follows:—

This is an action by the plaintiff on a promissory note for £40 and interest payable to him, against the defendant, executor of the last will, &c., of *William B. Dill*, deceased. The deceased signed the note as surety of *William Dill*. The defendants did not deny the making of the note by their testator, but pleaded usury.

The cause was commenced by the defendants, and *William Dill* was put on the stand. He said that being in want of money he applied to the plaintiff for a loan of £40, who told him if he got money in *Halifax* he would let him have it;

that he asked him what he would charge, plaintiff said \$10, that parties in *Newport* had offered him more; that he then asked plaintiff what security he required, and mentioned over several names to him; plaintiff said he preferred *W. B. Dill*; after seeing *W. B. Dill* he told plaintiff he agreed to join him as surety; plaintiff then said he would throw off \$2; he then agreed I was to give my note for £40 and to receive £38; he then told me the money was with *Mr. King*, and for me to go to *Windsor* and get the money from him, and give him the note; that he did go to *King* and received the same as money, a debt that he owed, that was to be paid to *King*, and on which he was to get credit for £38; that *W. B. Dill* was present with him and signed the note; that he told *King* of the contract with plaintiff, and that he subsequently paid interest on the £40; that plaintiff told him he would leave £38 for him at *King's*. He was the only witness for the defendants, and the only witness for the plaintiff was the plaintiff himself, who stated no such contract as *Dill* referred to ever took place; that *Dill* came to him when working in the field for a loan of £40, and that he told him he thought he could get it for him; that a day or two afterwards he saw *King* and went to *Halifax* for money; returned the next day and paid the money, £40, to *King*, but did not secure the note until after *King's* death; that he did not know what money was paid to *Dill*; that two years' interest had been paid to him by *Dill*, and endorsed upon the note; he never asked, he says, either \$8 or \$10 from *Dill*. His statement is not true on that point.

His Lordship, in his charge, left the contradictory statement of the plaintiff and *Dill* to the jury, telling them to find for the plaintiff or defendant as they might credit their respective statements, and that if they believed *Dill's* testimony, it established the usury,—the jury found for the defendants. A rule was granted to set aside the verdict on the grounds that it was against law and evidence, and for a misdirection of the Judge.

At the argument the counsel for the defendants moved to have another point included in the rule—the rejection of evidence—and he was permitted to argue the point, with the understanding if the Court considered there was anything in

it, the opposite counsel should have an opportunity of answering it at a future day. I will give my reasons why the rejection of the evidence by the Judge was correct, hereafter. There was some confusion in the defendant's evidence about the manner that the money was paid to him by *King*, and the evidence of the plaintiff was equally confused, if not more so, with respect to the transaction, and as if to escape from his difficulty, he said he had not a good memory, that his head had once been hurt. The jury, however, heard the testimony, and were the best judges of the credit due to the parties.

It is scarcely necessary to refer to any authority to show that a loan of £38, and a note taken for £40 and interest paid on the £40, makes it usury, and brings it within chap. 82, sec. 1, of our *Revised Statutes* (3rd series). I may, however, refer to *Floyer v. Edwards*, Cowper's Reports, 114, as it is a leading case, and generally referred to in cases of usury. In that case Lord *Mansfield* said: "In all cases in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction, the view of the parties must be ascertained to satisfy the court that there is a loan and borrowing, and that the substance was to borrow on the one part and lend on the other, and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. Here, then, according to the evidence of *W. B. Dill*, there was in the language of Lord *Mansfield* a loan and borrowing, and in that case nothing will protect the taking of more than six per cent. under our statute.

I will now refer to the rejection of evidence by the Judge upon the cross-examination of *Dill*. He said: "I know *King's* handwriting." He is then shown a book in which he recognizes the handwriting of *King*. Upon the part of the plaintiff at a subsequent stage of the trial a book of *King's* was offered in evidence and objected to by the opposite side, and the Judge declined to receive it. I have referred to all the evidence that has any reference to the book; what the book was, and for what purpose it was offered, does not in the evidence appear, and I do not think we have a right to go out of the evidence to assume anything as to the object for which it was offered. If it had been offered as containing an

entry against the interest of the party making it, the learned Judge would have something to decide upon. The book offered may have been blank, with the name of *King* written on the first page, for anything to the contrary appears, but whatever it was offered for should have been mentioned to the Judge. If offered as declarations in the course of office or business, the death, the handwriting, and the official character of the person making the entry should have been proved, and that he had no motive to mis-state, before the book could be received; and if offered as against the interest of the party making the entry, before the reception of the entry could be received he was bound to prove it against the interest of the person making it, and that the interest was of a pecuniary nature. Not anything of this kind whatever was brought to the notice of the Judge, and, therefore, I think he was right rejecting the book.

At the argument it was held that the evidence of *Dill* was insufficient as against the note and the evidence of the plaintiff, as if the plaintiff succeeded against the defendants they would have their action over against him. There is that difficulty in all cases since the Act enabling plaintiff and defendant to be witnesses in their own cause, and where neither of them are sustained by other testimony; but after all, their credit is purely for the jury, and it is their province to decide which of the parties they believed, and the Court should not interfere with their decision. In *Speeding v. Young et al.*, 16 Com. Bench, N. S. 824, for money expended by the plaintiff at the request of the defendants. The only witnesses examined at the trial were the plaintiff and the defendant, and the learned Judge left the case to the jury upon the conflict of evidence, and they returned a verdict for the defendant; a new trial was moved for upon the ground (with others) that the verdict was against evidence. At the argument *Erle*, C. J., said there was evidence on both sides which no doubt went to the jury with proper remarks by the learned Judge; the other Judges concurring, the rule for a new trial was refused.

I know it may be said that admitting the contract in the field as proved by *Dill*, the plaintiff had a right to repent at any time before the money was paid by *King*; but if he did

so repent of his unlawful contract, he was bound to notify it to *Dill*, and if *King's* books could have proved that such was the case by an entry made by *King* against his interest or in the course of business, then the proof was upon the plaintiff and not upon the defendant. If *King* had been alive at the trial of the cause, as he was plaintiff's agent to pay the money to *Dill*, and the plaintiff not knowing what money he had paid, and the defendant not being contradicted on that point, it would have been the plaintiff's duty, and he would have been bound to produce *King*, if by doing so he could have contradicted *Dill*. The death of *King* does not change the principle, and it was for the plaintiff to have produced *King's* books, and satisfied the Judge if there was such an entry in them as could have been admissible in evidence to prove what money in reality was paid to *Dill*, and not having done so, the presumption is that there was no such entry.

The learned Judge who tried the cause, in my opinion left the case correctly to the jury, and he could not have left it more open than he did, and their finding, I think, should not be interfered with. If the Court were to decide for the plaintiff upon his single evidence, contradicted only by that of the defendant, they would decide against the case I have referred to from 16 *Com. Bench*, and introduce a new element into the law of evidence not heretofore recognized in a court of law. The rule for a new trial should, in my opinion, be discharged with costs.

WILKINS, J.—For the plaintiff there is in evidence the fact of the note given for £40; his assertion "that he gave that sum to *Mr. King*, since deceased;" "that he did not know what money *King* paid *Dill*;" that he instructed *King* not to let *Dill* have the money "without good security," thus intimating that was the only instruction he gave him. Plaintiff's testimony is confused and unsatisfactory, but while acknowledging that a conversation took place in the field, he denies *Dill's* statement as to an arranged deduction of 40s. from the £40 for which the note was to be taken. *Dill* says it was arranged in the field that the 40s. was to be deducted, and that *Mr. King* gave him credit for £38 only, but on that



point he might well have been mistaken, for he speaks doubtfully as to what the subject of the credit was, and no money passed. He says, "I don't know what money plaintiff left." It would not have been unreasonable, perhaps, to require that the defendants, there being this contradiction and uncertainty, should produce *King's* book or some other corroborating evidence of the real amount and circumstances of the credit. It must be assumed that the jury believed the alleged previous arrangement about the deduction; but there are not sufficient facts in proof to warrant an inference that that arrangement was carried out in the actual contract by the authority of the plaintiff. The learned Judge told the jury that if they believed *Dill*, his testimony established the usury. That direction unqualified, was, I fear, likely to mislead. I think they should have been told that if they believed *Dill*, and believed that plaintiff instructed *King* to withhold 40s., and that it was withheld accordingly, the usury was established. That strikes me to be an important qualification of the necessary direction, for plaintiff may have arranged in the field to deduct, and may not have carried it out when he left the £40, from having forgotten it, or recollecting it, he may have repented of it afterward. Where the defence is usury, and the plaintiff proves a note given for £40, and swears his agent was paid, that very sum, as the consideration of the note to be given, representing a loan of that amount, and the only opposing evidence is, that a maker of that note swears he received from the agent of plaintiff only £38, not in money, but in a credit, the particulars of which he cannot define, and of which there is no corroborating evidence, I do not think there is a preponderance of testimony sufficient to annul the written contract on the ground of illegality. As regards the book, my opinion is, that it is for the counsel who offers a book to point out to the Judge the particular entry on which he relies, in order that the Judge, on inspection of the entry relied on, may decide to receive or reject it, as being or not being evidence under the issue. From the report we know nothing of the character of the evidence thus offered. An entry made by the attorney of the plaintiff appearing to be against his interest or in the ordinary course of his business if relating to this transaction, would be after his decease,

evidence and perhaps decisive evidence. I think the rule should be made absolute, but not on the ground of the rejection of the book.

RITCHIE, J.—The defence set up in this action, which was brought to recover the sum of £40 and interest on a promissory note, is that £38 only was advanced by the plaintiff, and that on that account the note was void for usury. The burden of establishing this defence is entirely on the defendant. The only witness produced for that purpose is the borrower of the money and maker of the note; he testifies to a verbal arrangement between himself and the plaintiff whereby the latter was to advance £38 and receive a note for £40; this arrangement was to be carried out at a future day at the office of *Mr. King* at *Windsor*. As the plaintiff denies that he ever made an arrangement on these terms, and asserts that he gave £40 to *Mr. King* for *Dill*, with no other instructions than not to let him have the money unless he gave good security, it becomes all-important to know what took place at *Mr. King's*, in order to ascertain what the agreement really was; for when a parol agreement has been afterwards reduced to writing, we must look to that alone as the contract. Is there in this case evidence to establish usury and defeat the plaintiff's claim on the note. It is true *Dill* says he received but £38 from *Mr. King* yet he gives the most vague and unsatisfactory account of the matter, he does not pretend that he received the amount in cash, but in what he says was the same as money, it was a debt he owed which had to be paid to *Mr. King*, he got credit for it. In his cross-examination he is not able to say on what account, or whether for interest or a mortgage or otherwise; at one time he says no money passed, at another, "I got no money at *Mr. King's*, I do not think I did;" and he is unable to give any particulars of his settlement with *Mr. King*. This being the state of the evidence, one would naturally look to the books of *Mr. King*, who is since deceased, for an entry of the transaction, and these are tendered by the plaintiff, and the reception of these is opposed on the part of the defendants; it may not have been imperative on the defendant to have produced these books, but if they were not produced, the

Court had a right to expect evidence of a more satisfactory character than that produced by him, for, to render a promissory note void on account of usury, the evidence should be clear and satisfactory, and such in my opinion it was not in this case, and I think the charge of the learned Judge is open to the objection taken to it, and was calculated to withdraw from their consideration what might have influenced their verdict. I think, therefore, there should be a new trial.

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### SEAMAN ET AL. v. CUTTER.

DEFENDANT became the lessee of certain premises upon which was deposited a quantity of coal belonging to plaintiffs. Shortly after taking possession defendant served plaintiffs with a written notice to the effect that if they did not remove the coal he would and charge them with the expense of removing. They paid no attention to the notice and defendant thereupon caused all the coal to be carted away, and the greater part of it destroyed. Some small portion of it was used by his servants.

*Held*, that a verdict in trover for the plaintiffs could not be disturbed.

DODD, J., now, (December 30th, 1871,) delivered the judgment of the Court:—

Trover for the conversion of the plaintiff's goods, &c.; 1st plea,—did not convert; amended plea,—not the goods of the plaintiff. There was a third plea on the record, which the learned Judge who tried the cause treated as a nullity, and it is difficult to understand how it otherwise could be treated. The plea commences by stating that the defendant is lessee of certain lands, &c., situate, &c., from *Amos Seaman* deceased; that at the time the said *Seaman* leased the said land, &c., a quantity of coal, being the same mentioned in plaintiffs' writ, was deposited on said leased premises, which said coal injured and encumbered said land, and interfered with defendant in the use and occupation of the same, &c.; and defendant on or about the tenth day of *August*, 1866, caused written notice to be served on plaintiff to remove the said coal from off the said premises, but that defendant neglected and refused so to do; and there the plea stopped, not alleging that he removed the coal to some adjacent place for use of the plaintiffs, in fact the essential part of the plea omitted. The learned counsel at the argument of the cause during the present term

admitted the plea to be informal, but thought it should have been demurred to. That it might have been demurred to I have no doubt, but leaving it on the record raised no legal issue that, in my opinion, the learned Judge at the trial could have submitted to the jury.

The issue raised by the amended plea was disposed of by the evidence of one of the plaintiffs, *Rufus Seaman*, who proved title to the coal, and no attempt on the part of the defendants to disprove it, but on the contrary admitted it by the notice given to the plaintiff to remove it from the premises. The whole defence is then left to the issue raised by the first plea,—did the defendant take and carry away the coal, and convert and dispose of it to his own use? "This he denies." Now, then, let us examine the evidence; the affirmation is on the plaintiffs and they are bound to prove the case. It appears the coal was purchased by the plaintiffs for steam purposes and deposited at *Lower Cove*, partially protected by a wood-shed; that it was removed from there by the servants of the defendant, and by his authority. *Burke*, the principal witness for the plaintiff states that he took away the whole of the coal in the shed by defendant's order and with his team. Some he put on the road, some he put into a hole that was pretty deep, and some into the river, that is into the tide as he subsequently explained it; in this he was assisted by the defendant's men. He had also used some of the coal in the defendant's smithy for the defendant's work, and upon one occasion took two barrels of coal to the upper shop by direction of defendant, some of the coal was removed three-quarters of a mile to the *Upper Cove* by the orders of defendant, although the large proportion of it was removed but 150 yards. The coal, he says, was rendered useless by putting it in the tide and hole. In speaking of its value he says he would give more a good deal than £5 for it, and haul it away. The defendant told him to haul the coal away and pitch it into the river; half the coal he says was round and half slack. The case largely, if not altogether depends upon the evidence of *Burke*, and in answer to it let us see what the defendant says in his evidence. In the first place he denies giving *Burke* authority to take any of the coal on his account, and that it was not used by him or his men, or his men by

his sanction ; that he did not think the coal worth removing, and that it was entirely valueless ; he subsequently admits, however, it was useful for steam purposes, the object in fact for which the plaintiffs purchased it. He also admits, after giving notice to remove the coal, that it was removed by his directions, but that he gave no authority to put it on the sand, and that if he gave him any instructions it was to remove the coal ; but he does not deny what *Burke* stated, that he told him to take it away and pitch it into the river. He says he saw the coal removed, and if he saw it removed by his servants and put into the road or put into the river, he adopted the wrong and was equally liable as if put in those places by his express orders. *Weldon*, a witness for defendant, says he had seen men take the coal from the shed in barrels in boat and skiff and removed to shop by *Burke*, who was then working by the piece. *Brown*, another witness for defendant, saw some of the coal tipped over the bank. I have omitted a large proportion of the evidence, as it was not applicable only to a plea of justification. That the coal was not valueless is proved from the mouth of the defendant as also from his witnesses. I cannot understand why an application was not made to the Judge at the trial to amend the plea that was considered a nullity and make it what it should have been, a justification for the removal of the coal. I am certain the learned Judge would have had no difficulty in allowing the amendment, and as it would have been no surprise to the plaintiffs after the notice they had received to remove the coal. After that notice, and the plaintiffs not attending to it and removing the coal, it was contended at the argument that they had abandoned their right to it, and the defendant was excused in considering it valueless and removing it in the manner he did ; but as I understand that notice as admitted at the argument, it was to the effect that if the plaintiffs would not remove the coal the defendant would, and charge the plaintiff with the expense of removal. There was certainly nothing in this notice to lead the defendant to suppose that the plaintiffs would waive their right to the coal, but rather to suppose the defendant would do what the notice said he would,—that is, remove the coal at their expense if they did not remove it.

In view of the whole case, I am of opinion it was fully made out in such a manner as to justify the learned Judge in his charge to the jury in directing them to find a verdict for the plaintiffs, leaving the question of damages in their hands. *Fouldes v. Willoughby*, 8 M. & W., 540, was cited by the counsel for the defendant. The question in that case turned upon the intention of the defendant to convert to his own use the chattels of the plaintiff. The Court held a mere wrongful asportation of a chattel did not amount to a conversion unless the taking or detention of the chattel was with intent to convert it to the taker's own use or that of some other person, or unless the act done had the effect either of changing or destroying the quality of the chattel. It cannot be contended for a moment that in the present case the defendant did not both destroy and change the quality of the coal. He directed it to be removed, saw it removed, and in the removal that put on the road and thrown into the tide was completely destroyed, so as to destroy all benefits to the plaintiffs in the coal. *Simmons v. Lillystone*, 8 Exch., 431, also cited by defendant's counsel, and the Court there held very much the same as they did in *Fownes v. Willoughby*, as to what constituted a conversion, but the facts in both these cases were very different from the case under consideration. In conclusion, I think there is not anything in this case to justify sending it for a second trial, and therefore that the rule for a new trial should be discharged with costs.

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• RYERSON ET AL. v. LYONS ET AL.

PLAINTIFFS had for some years furnished outfits and supplies for a fishing vessel of which defendants were part owners. In 1866 it was agreed among the owners that J. McC., one of them, should manage the vessel on his own account, paying all expenses, and that the others should receive certain proportions of the proceeds, but of this agreement plaintiff had no notice.

Held, that defendants were liable for goods supplied by plaintiffs to J. McC. in the usual way after the agreement.

RITCHIE, J., now, (December 30th, 1871,) delivered the judgment of the Court:—

The defendants were part owners of a vessel employed in the fishing business, and the plaintiffs, on the order of the

ship's husband, furnished such outfits and made such advances as are necessary and usual for such voyages, some of which, especially advances to the seamen who were sharesmen, were not of such a character as the owners of a vessel would usually be liable for. This was done in the years 1864 and 1865, including two voyages in each year, *James Lyons, Jr.*, being ship's husband in the former year and *James McComsby* in the latter. The amount of the accounts thus incurred was paid out of the proceeds of the fish taken; the course of business being for the owners to receive and make the fish and pay for all advances out of the proceeds, and account to the seamen as sharesmen for the balance of their respective shares. In 1866 the vessel was engaged in the same business, and *James McComsby*, who throughout had been the master, applied again to the plaintiffs and obtained from them the outfits and advances as on the previous occasions, for the amount of which this action was brought against the owners of this vessel.

The defence is that in the last mentioned year it was agreed among the owners that *James McComsby*, one of them, should manage the business on his own account and pay for advances, and that the other owners should receive one-fourth of the catch and one-ninth for the making of the fish; and nothing of this, however, was communicated to the plaintiffs.

In *Ryan v. Sams*, 12 Q. B., 463, the defendants had recognized orders given by a woman with whom he lived, and had paid for work in fitting up rooms, etc., in accordance with such orders, at two different houses in which they had lived; they afterwards separated, and she gave orders for work in a house she herself occupied, yet the defendant was held liable, he not having given notice of the separation; the Judge there left it to the jury to say whether the defendant had so acted as to induce the plaintiff to believe that the woman was still his agent. See also *Watkins v. Vince*, 2 Star, 368, and *Haughton v. Ewbank*, 4 Camp., 88, and 1 Pars. Contracts, 60. *Sundeman v. Scurr*, Law Reps., 2 Q. B., 94, was a case where a vessel was chartered, and the plaintiff had laden goods on board without being made aware of the charter. *Cockburn, C. J.*, said: "We proceed on the well-known principle that where a party allows another to appear before the

world as his agent in any given capacity, he must be liable to any party who contracts with such agent in a matter within the scope of such agency.

These principles apply to the case before us; the vessel being engaged in the same business, with the same master, and he the owner who had acted as ship's husband in preceding years, the plaintiffs had a right to infer that the supplies were applied for and given on the credit of the owners of the vessel as on former occasions, and if they had desired to relieve themselves from liability, they should have notified the plaintiffs of the new arrangement which had taken place between them, who would then have had the option of giving or refusing the supplies on the credit of *McComsby* alone. Not having done so, the jury were justified in finding their verdict for the plaintiffs. The rule for a new trial, therefore, should be discharged with costs.

### DUVAR ET AL. v. BURKNER ET AL.

THE defendants entered into the following agreement with the plaintiffs: "And the said L. Burkner and Francis Ellershausen, do hereby in consideration of the premises promise and agree on or before the first day of July, A. D., 1868, to form a company to work a coal mine within said area and elsewhere, and for other purposes, and to deliver to the said I. Hunter Duvar and Thomas R. Fraser, at that date paid up shares in such company to the amount of \$9000 and, further, that in the event of said L. Burkner and Francis Ellershausen not forming such company, and having the same in practical operation according to law, and delivering such paid up shares as aforesaid at the date aforesaid; that then the said L. Burkner and Francis Ellershausen, their heirs or assigns, shall at that date pay to the said I. Hunter Duvar and Thomas R. Fraser the sum of \$3000 in cash." The defendants obtained an act of incorporation in the State of Maine, and also another in the Province of Nova Scotia, but they did not comply with the terms of the latter act, which consequently never took effect. They formed a company, issued stock, and went into operation under the Maine act. Plaintiffs declined to accept the stock issued under the Maine act, and brought this action for the purchase money as payable in cash. Verdict for plaintiff for the full amount.

*Held*, that defendants had fulfilled the agreement so far as "forming a company and having the same in practical operation" was concerned, but that the shares were not such as were contemplated by the agreement. New trial ordered unless plaintiff consented to reduce their verdict to such an amount as the Court considered shares under a Provincial act with the usual statutory provisions would be worth.

YOUNG, C. J., now, (December 30th, 1871,) delivered the judgment of the Court:—

This action was brought on an agreement of *April* 2nd, 1866, containing after certain recitals and a conveyance, the following clause:—"And the said *L. Burkner* and *Francis*



*Ellershausen*, do hereby in consideration of the premises promise and agree on or before the first day of *July*, A. D., 1868, to form a company to work a coal mine within said area and elsewhere, and for other purposes, and to deliver to the said *I. Hunter Duvar* and *Thomas R. Fraser*, at that date paid up shares in such company to the amount of \$8000 and and further that in the event of said *L. Burkner* and *Francis Ellershausen*, not forming such company, and having the same in practical operation according to law, and delivering such paid up shares as aforesaid at the date aforesaid; that then the said *L. Burkner* and *Francis Ellershausen*, their heirs or assigns, shall at that date pay to the said *I. Hunter Duvar* and *Thomas R. Fraser* the said sum of \$8000 in cash."

In *January*, 1867, the defendants obtained an act of incorporation from the Legislature of the State of *Maine*, making the capital stock \$750,000 in shares of \$10 each, without any condition for payment. In *May*, 1867, they applied to our own Legislature for a similar act, which the plaintiffs opposed, and finally the 30 *Vic.*, chap. 44, was passed, making the capital \$500,000 in shares of the par value of \$10, with power to the company to increase the stock to \$750,000, but the company was not to go into operation until 25 per cent. of the capital stock should have been actually paid in. The actual payments required by these mining acts, so frequent in our statute book, are in almost every case evaded. In this case an actual payment of \$125,000 would have greatly raised the value of the shares to be delivered the plaintiffs: but it is most unlikely that such payment was ever contemplated by either party. At all events it was not made, and therefore the *Nova Scotia* act never took effect. The company, however, went into actual operation, and issued stock under the *Maine* act. Their returns to the Provincial Government, thirteen in number, were produced at the trial, and after expending \$30,000 or \$32,000 *Nova Scotia* currency, like too many others of such enterprises, they collapsed in the fall of 1868, this action having been brought in *August*, 1867.

The main question is the true construction of the agreement, after looking at the decisions. What company was to be founded by the defendants? What is the meaning of "paid up shares"? Was the company in practical operation

according to law? The Judge who tried the cause was of opinion that the agreement had been substantially performed by the defendants, but I am unable, after looking at the decisions, to acquiesce in that view. Corporations of this class are so much more abundant on this side the Atlantic than in the mother country, that we must look mainly to *American* authorities, and especially to those of the *United States*. These last are collected up to the year 1869 in *Abbott's Digest of the Law of Corporations*, and I find on reference to this work, and to such of the cases as are within our reach, that neither counsel are altogether sustained in the positions they took at the argument. It is laid down at page 337 that, although a corporate company may carry on business beyond the territorial limits of the State which created it, (and the same principle will apply to a Province of the *Dominion*), it has no corporate existence beyond these limits. So also, a corporation owing its existence to, and exercising its functions in, several States, must be treated by the courts of any one State as a separate corporation, to the extent of its action under the government of that State, and as a foreign corporation under the other sources of its existence. In the leading case of the *Bank of Augusta v. Earl*, 13 Peters 519, Abbott, 218, it was held that corporations legally established under the laws of a State, are legally competent to negotiate and enter into contract beyond the jurisdiction of the State where they are created. It is true that a corporation exists only in contemplation of law and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its existence and cannot emigrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible: yet it is a person for certain purposes in contemplation of law. Corporations created in the *United States* have for many years made contracts in *England*, with never a doubt suggested of their validity; and the rules of amity between foreign nations

apply to the States of the Union, and I may add also to and also between the Provinces of this *Dominion*.

In the light of these principles, I think we must hold that the *Pictou* Mining Company, though incorporated in the State of *Maine*, spending its capital here and drawing forth the resources of the country, was in practical operation according to law, and that in so far the agreement was satisfied. But was it such a company, was its constitution and organization such as the agreement contemplated and the plaintiffs had a right to expect? The shares were surely intended to have some value, to represent some portion of actual capital, else they might have been still further dilated, and the number raised to one and fifty thousand or five hundred thousand shares in place of fifty thousand. This would have created the agreement and the delivery of shares into a mere delusion, a share in place of a reality. Paid up shares, as I think, meant shares of some substantial value not subject to call. In my view, therefore, the jury did right in giving the plaintiffs a verdict, but not for the full amount;—one-third of the \$8000 had been satisfied by the assignee accepting shares which cost him little or nothing. Applying the principle of the Provincial act and requiring the actual payment of 25 per cent., the cash value of the other two-thirds did not exceed one-fourth of the \$5333 awarded by the jury.

Upon the whole I am of opinion that there should be a new trial, unless the plaintiffs consent to reduce the verdict to \$1333, with costs of action and trial, neither party to have costs of argument.

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### HAMILTON v. NORTHUP.

PLAINTIFF having obtained an injunction to restrain the sale of a mining property in which he was interested, the defendants made answer under oath, negating all the allegations on which the plaintiff's claim to relief was founded.

*Held*, that credit must be given to the answer and the injunction must be dissolved (fraud not having been shown), under the principle laid down in *Chaplin v. White*, 8 Ves., 367.

McCULLY, J., now, (December 30th, 1871,) delivered the judgment of the Court:—

Writ of injunction issued at the instance of plaintiff to restrain defendants (an incorporated joint stock company)

from selling certain mining areas at *Mount Uniacke*. The case comes before the Court on appeal from an order obtained by defendants in Equity to dissolve the plaintiff's injunction. The injunction was obtained *ex parte* by plaintiff on a writ issued by him, setting forth a case, this complaint being that as a stockholder his rights were about to be sacrificed by a sale of the company's areas and effects. The company were incorporated in *September, 1868*; plaintiff had been president from the organization up to *15th February, 1870*. In his affidavit to obtain the injunction, *25th March, 1870*, plaintiff states these facts. He also states that *Bayne*, a stockholder, claimed for some time, that the company owed him a balance on account; this account had been submitted by the company in the previous *November, 1869*. Plaintiff in his affidavit alleges that if sold under the advertized notices, his own, and the co-owners interests would be prejudiced. He complains of want of sufficient notice to attend the meeting, and short notice of sale, and alleges that the effect of the sale will be to throw the property into the hands of a few individuals, not specifying who they are, further than to the exclusion of a majority of the stockholders. No bye-laws are set out, nor are their contents given; they had been applied for by plaintiff, but never having been printed or circulated, what their nature was does not appear.

An affidavit of *B. H. Euton* was used in obtaining the injunction, but it merely refers to his being refused to be acknowledged as plaintiff's representative at the meeting of *15th February*; states that he was not permitted to take any part, though he was the partner of *Mr. Weatherbe*, who held a proxy from plaintiff, and on the day of the meeting he was sick and unable to attend; copies of papers were refused him, nor was inspection granted.

The writ of injunction was granted *25th March, 1870*, on which day the suit was commenced by summons. The writ of summons does not summon the defendants, as the "*Westlake Company*," but by their proper names, and charges them as directors of the company with endeavouring to procure a fraudulent and improper sale of the property of said company, so as to be purchased by or on behalf of said last mentioned defendants, &c. Plaintiff alleges that he had no sufficient

notice of the meeting of 15th *February*, that it was illegal, &c. ; that there was no authority to sell, and property would be sacrificed, &c.

To this summons defendants answer under oath, that is under the oath of *Wirell*, and every one of the many important allegations in plaintiff's summons and affidavits by the answer of defendants is negatived. *Maddock*, vol. 2, p. 336, in his work on *Chancery Practice* says: "If the answer denies all the circumstances upon which the Equity is founded, the universal practice as to the purpose of dissolving or continuing the injunction is to give credit to the answer, and that is carried so far that unless in a few excepted cases, though five hundred affidavits were filed, not only by plaintiff but by as many witnesses, not one could be read to prevent dissolving the injunction," citing *Clapham v. White*, 8 Ves., 36. Lord *Eldon* says: "The exceptions are, it seems, cases of waste, or an infringement of patents, and some other cases, such as fraud or mischief analagous to waste." But Lord *Eldon* disapproved of them.

The answer in the case was filed 1st *April*, 1870, and the order dissolving the injunction bears date the 26th *April*, 1870. I find no evidence of fraud in the affidavit of plaintiff or *Eaton*, supposing that fraud to be an exceptional case, that could take this case out of the general principle enunciated in *Clapham v. White*, 8 Ves., 36; and although his Lordship the Chief Justice received affidavits from defendants on the motion to dissolve, and affidavits from plaintiff in reply, which conflict in almost every important feature, (and viewing it from that standpoint I see nothing that would justify me in coming to any other conclusion than the one at which he arrived,) yet I prefer to base this judgment upon the authority in *Maddock*, and with an answer under oath so completely negativing plaintiff's case as set forth in his affidavit of 25th *March*, and his writ of same date, I am of opinion that the appeal should be dismissed with costs.

In this judgment the whole Court concurred.

## HARRIS v. WIER.

PLAINTIFF was tenant to defendant, who distrained for the first quarter's rent before the expiration of the first month. There was no evidence to show that the rent was payable in advance. Defendant's wife gave security for the month's rent. About the middle of the second month the defendant distrained again for the first month's rent.

*Held*, that even if the first distress was legal, the defendant was not justified in the second, as the plaintiff had committed no act to prevent him from getting the benefit of that distress.

DODD, J., now, (December 30th, 1871,) delivered the judgment of the Court:—

This action is for the wrongful conversion of the plaintiff's goods. Pleas, 1st, that he did not convert the plaintiff's goods; 2nd, that the goods were not the goods of the plaintiff; 3rd, that the plaintiff being a monthly tenant to the defendant, and a month's rent then being due and payable, the defendant took the said goods under a distress for the said rent, as he lawfully might, &c. Upon the issues raised by these pleadings the cause was tried before the Chief Justice at *Halifax*, in *May*, 1870, when the plaintiff had a verdict. A rule for a new trial was granted by his Lordship, and the cause was argued during the present term. The grounds of the rule are, 1st, a discovery of new and important evidence since the trial; 2nd, the verdict was against law and evidence; 3rd, damages excessive; 4th, improper rejection of evidence, and for misdirection of the learned Judge who tried the cause.

The contest at the trial turned principally upon the tenancy,—whether the plaintiff was a monthly tenant or had taken the house for three months, with the rent payable at the expiration of that time. That inquiry does not become necessary at present, for admitting it to have been a monthly tenancy, the question is as to the second distress for the first month's rent. The house was taken by the plaintiff on the 5th of *August*, and the defendant says the rent was to commence from the first of the month, and on the 17th of the month the defendant's bailiff entered the premises, with a warrant directing him to distrain the goods and furniture of the plaintiff for the sum of £36 for one quarter's rent, due on the 31st *October*, 1868. There is not a particle of evidence to show that the rent was to be paid in advance, either monthly or for the quarter, and there was not anything to justify or

excuse the distress on the 17th, when the plaintiff's tenancy for the first month had not expired. Under that warrant the bailiff entered on the premises and distrained the plaintiff's goods for three months' rent. At that time the plaintiff had been absent from his house about a week; the warrant was shown to his wife, *Mrs. Harris*, who complained of the distress, saying she had been in the house only for a few days. The bailiff then took the defendant aside, and told him he could not distrain, when he told him to go back and see if he could not get a month's rent from her; she demurred to this, but agreed to turn out goods for a month's rent or give security, and she gave security, and the goods distrained were relieved. *McDonald* was the security and on the 21st of *September* the bailiff went for the goods to *McDonald*, which had been given to him on becoming security, the defendant telling him that the plaintiff's wife had been in the house three or four weeks and was running away with the goods, and that the plaintiff had gone to the States on the 23rd of *September*; he asked the bailiff why he did not distrain for another month's rent. At this time it is evident he was satisfied with the security for his first month's rent, or he would not have asked the bailiff why he did not distrain for a second month. The goods had been put into the hands of the surety, *McDonald*, for the first month's rent, and had never been returned to the plaintiff. Those facts, as I have extracted from the evidence of the bailiff and *Mrs. Harris* stand uncontradicted by the defendant, and clearly from that under the first warrant a month's rent was secured to the defendant. Under those circumstances our inquiry must be to the right exercised by the defendant in making a second warrant on the 25th *September*, evidently for the first month's rent, as the second would not be due until the first of *October*. The second warrant is dated the 26th *September*, but the defendant says he distrained on the 23rd. The bailiff says he took the goods on the 27th, that are the subject of the present action. At the argument it was contended by the counsel for the defendant that he was justified in making the second distress as he derived no benefit from the first, and several cases were cited in support of that position. I have examined the cases with much deliberation,

and find they do not support the position and are inapplicable to the case under consideration. *Crowder v. Self*, 2 M. & R., 190, was a case for an excessive distress. The warrant of distress was for a greater sum than that actually due, and it was held that the plaintiff was not entitled to a verdict unless the goods seized were excessive in regard to the sum really due. In *Davis v. Gyde*, 2 A. & E., 623, a promissory note was given and received for rent, but it was held it did not extinguish the claim for such rent, that was debt of a higher degree than that arising upon the note, and that if such note be pleaded in bar to an avowry, it must be shown that the note was accepted in satisfaction, or that by special agreement or from other circumstances it suspends the right of distress. This case appears to me to be as much if not more in favor of the plaintiff than against him, for here the right of distress was suspended by agreement to take the security of a third party for the rent, and Lord *Denman*, in giving his opinion in *Davis v. Gyde*, makes a distinction where the whole transaction is between the plaintiff and defendant, and where the security of a third party was given. I am not disposed to review the other cases referred to on the part of the defendant, as it would only extend unnecessarily this opinion, and would not benefit the defendant by doing so.

The general principle that justifies a second distress after the first for the same rent, will be found in the judgment of the Court in the case of *Lee v. Cook*, 3 Hurl & N., 203. In that case the defendants, commissioners for draining certain lands, distrained a bean-stack of the plaintiff for a rate due by him, and sold the stack by auction; at the sale the plaintiff said it would be one thing to buy the stack and another to take it away, and when the purchaser attempted to remove the stack from the plaintiff's premises he was forcibly prevented by the plaintiff. The purchaser did not pay for the stack, and the commissioners levied a second distress for the same sale. *Held*, in the Exchequer Chamber, (affirming the decision of the Court of Exchequer) that as plaintiff by his own misconduct had prevented the commissioners from realizing the first distress, the second was not unlawful. *Cockburn*, C. J., said "the whole question turns upon whether the first distress could have been carried out to



its complete accomplishment." *Williams, J.*, "it appears that the plaintiff's own misconduct rendered the first distress unavailing, and therefore he cannot complain of the second distress." *Crompton, J.*, "I am of the same opinion; the rule of law is very properly that a person cannot distrain a second time for the same cause, if he has had an opportunity of making available the first distress." *Crowder, J.*, "the first distress proved abortive in consequence of the wrongful act of the plaintiff, and, therefore, by the rule of law he cannot complain of the second distress." Admitting the defendant was justified in making his first distress, which is very far from being the case, still the plaintiff here committed no act to prevent him from the benefit of that distress, but on the contrary did all he could, by placing in the hands of defendant's surety goods sufficient to pay the first month's rent, and if the defendant failed in obtaining it from his surety, from the dishonoring of the surety, or from any other cause not the act of the plaintiff, he could not make the plaintiff a second time liable for it.

The question of damages was for the jury, and if not satisfied with the evidence of *Mrs. Harris*, the defendant could have produced the articles, as they were under his control at the trial, and I do not think there is any ground for a new trial upon that point.

The evidence of *Mrs. Harris* taken before the commissioner was secured and read at the trial without objection, and it is now too late to make the objection. I admit the evidence was open to strong suspicions, but the credit to be given to it was with the jury; her refusal to answer questions pertinent to the issues in the cause, if in Court would subject her to fine and imprisonment, and it is probable the rejection of the evidence so far as it went, as it was not complete without her answers. And if the objection had been taken to the reception of her deposition when offered at the trial, I am not prepared to say it might not have been rejected.

The objection that the property taken at the second distress was the property of *Mrs. Harris*, and that she was not the wife of the plaintiff, was also a question for the jury, and I think there was evidence sufficient to find the parties husband and wife. It was proved that before coming to

*Halifax* with the plaintiff she was living with him in *Boston* in the relation of man and wife, and in her evidence she says she was legally married to the plaintiff in the State of *Maine*, but admitted she had been previously married to a man of the name of *Hereford*, but whether he was still alive or not she did not know. The jury in this case was not bound to presume that her first husband was alive, but on the contrary, might fairly assume that he was either dead or had been absent from her a sufficient time to justify a second marriage.

The remaining question is as to the charge of the Judge. It appears to me that the learned Judge left the case of property, that involved the question of marriage between the plaintiff and his wife free for the jury to decide upon, and I think there was abundant evidence for them to decide in favor of the marriage. And upon the whole case I am of opinion the rule for a new trial should be discharged with costs.

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#### FULLERTON v. CHAPMAN.

CHARLES PRESCOTT drew on plaintiff in favor of defendant the following order: "Please pay Henry Chapman or order the sum of forty pounds currency, payable out of the first moneys received by you on my account." Plaintiff accepted by endorsement in the following terms: "Accepted to pay when I collect a sufficient amount out of Mr. Prescott's debts to pay the same." Defendant claimed that in afterwards adjusting accounts with plaintiff the plaintiff should credit the amount of the order.

*Held*, that without proof of money of Prescott's having come into the hands of the plaintiff he could not be made liable for the amount of the order.

New trial ordered where the testimony of the parties was contradictory, and the writings produced corroborated plaintiff, against whom the verdict was found.

RITCHIE, J., now. (December 30th, 1871.) delivered the judgment of the Court:—

The question in controversy on the trial of this cause was whether the defendants were entitled to credit for the sum of £40, the amount of an order drawn on the plaintiff by *Charles Prescott* in favor of *Henry Chapman*, one of the defendants, and the jury, having found in favor of the defendants—we are called upon to decide, whether, on the evidence adduced, they were justified in so finding.

It appears from the testimony of the two defendants, that the plaintiff rendered his account against the estate of the

late *Henry Chapman*, of which they were administrators, duly attested on the 15th *January*, 1861, claiming £57 4s. 8d. Some time after, the defendants having called on him with regard to the account, he told *Henry Chapman* that he would accept an order on him from *Prescott* for £40, as he was concerned in some business of his, *Henry Chapman* having mentioned to him that *Prescott*, who was reported likely to fail, owed him £40 or £50; a few days after, this order was presented to plaintiff: "*Buy Verte*, 7th *September*, 1861. Please pay *Henry Chapman*, or order, the sum of Forty Pounds Currency, payable out of the first moneys received by you, on my account. *Charles Prescott*," which he accepted by endorsement in the following terms: "accepted to pay when I collect a sufficient amount out of *Mr. Prescott's* debts to pay the same. *W. M. Fullerton*."

The order and the acceptance being both of them conditional, and no proof whatever having been offered that any money of *Prescott* had come to the hands of the plaintiff, he could not be held liable for the amount, nor would he have become legally liable, though he should at the time of the acceptance, have given the most unqualified verbal promise to pay the amount, for it would be against the first principles of the law of evidence that the terms of a written acceptance could be varied by any contemporaneous parol agreement.

But the defendants go on to say that subsequently the amount of the account between them and the plaintiff was adjusted, and this appears by an endorsement on the attested account of the plaintiff, signed by the defendants, dated 26th *February*, 1862, whereby they consent and agree to allow the sum of £56 16s. 8d. to be due, and they say that on the occasion of this settlement the plaintiff agreed to accept the order and to give credit for the amount of it, on account of the debt so adjusted, and that thereupon the order was delivered up to him, and they have never seen or heard of it since.

The plaintiff, in his evidence, altogether denies the correctness of the account of the transaction, so far as relates to his having agreed to take the order unconditionally, and to give credit for the amount; and the Court thinks that there are many circumstances which militate against the statements of

the defendants and favor those of the plaintiff, especially the fact that when the plaintiff is alleged to have agreed to take the order of *Prescott* as a payment, the amount is settled at £56 16s. 8d., and no credit is given for the £40 in the statement then signed by the defendants, and in that statement the £56 16s. 8d. and not what would be the balance if the £40 had been credited, is made payable with interest, and subsequently a payment is made which defendants considered would pay the balance after crediting the £40, but this was not so stated to the plaintiff, and was not received by him as such, and a receipt for the amount so paid was taken by the defendants *on account*.

There having been no evidence in the case of any importance, except that of the defendants and plaintiff, and all the written documents being in corroboration of that of the plaintiff and inconsistent with that of the defendants, the Court thinks the verdict unsatisfactory, and that the case should be submitted to another jury.

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BRETT ET AL. v. LOVETT.

THE plaintiff made large advances to defendant, owner of the brig *C. Lovett*, and received a bill of exchange drawn by the captain of the vessel in his favor for the full amount of the freight to be earned by the voyage on which she was then proceeding. The bill was drawn upon Baring Bros., who advanced the amount of it to plaintiff. The vessel failed to complete her voyage, and the insurers on freight paid only for average to the amount of about one-half the bill of exchange, which was credited. Defendant being called on to pay the balance pleaded laches in relation to the bill.

*Held*, that the bill in question could not be treated strictly as a bill of exchange, but rather an appropriation of the freight, which had partially failed. Defendant was held liable to make up the deficiency.

YOUNG, C. J., now (December 30th., 1871,) delivered the judgment of the Court.

It was agreed in this case that a verdict should be entered for the plaintiffs for the amount of their particulars, subject to the opinion of the Court, and on an examination of the evidence the facts seem to be as follows: The brig *C. Lovett*, owned by the defendant, being in *New York*, was chartered on a voyage to *France*, and the freight was estimated at £420 stg., which was to be received by *Baring Brothers* of

*London.* The plaintiff advanced \$544.62, balance of disbursements, and delivered the defendant goods to the value of \$2268.51, and the master of the brig at defendant's instance drew a bill of exchange on *Baring Bros.* in favor of plaintiff for £420, worth in *New York* \$2812.13, the joint amount of the above sums, which the plaintiff accepted as a settlement of the account, and had the freight been realized and the full amount of the bill been passed by the drawees to the credit of the plaintiffs, the transaction would have been closed. But on the passage the brig was abandoned in *Long Island Sound*, to the underwriters, who refused to accept the abandonment and pay as for a total loss, whereupon the vessel was repaired in *New York* and was ultimately sold in *France* on a bottomry bond. The insurers on freight in *London* paid only for average £231 17s. 6d., from which the premium and commission £19 4s. 3d., being deducted, the balance was £212 13s. 4d., in place of the £420 drawn for and insured, and the difference of £207 6s. 8d. stg., is the subject of controversy.

Now as there is no room to impeach the good faith of the plaintiff or of *Baring Bros.*, and the fund on which the master of the *Chas. Lovett* drew was diminished without any fault of theirs, it is clear that the defendant, as owner of the vessel, and having received value from the plaintiff in advance of the freight, ought to make them whole. He owes the balance either to the plaintiff or to *Baring Bros.*, who refused however, to look to him and have charged the plaintiff with the amount.

The defendant's counsel insisted at the argument that his liability to the plaintiffs, if it were not at an end, was suspended at least by their taking the bill, and that they were bound to present it in due course and notify the defendant if it were dishonored, in the same way as if he had been a party to it. And besides the ordinary text books the counsel cited among others the cases of *Peacock v. Pursell*, 14 C. B., N. S., 728; S. C., 8 L. T. Reps., N. S., 636, and *Smith v. Mercer*, 3 L. S., Exch., 51.

Now it cannot be questioned that a party accepting a bill in satisfaction of a debt must deal with it according to law, and that any laches in handling the bill or giving the

necessary notices will be fatal. The question is, do these principles apply to this case? There is no reason to suppose that the bill was dishonored. It was obviously remitted by the plaintiffs to the drawees, and it would seem from the letter of *Baring Bros.*, 26th June, 1868, attached by the plaintiffs to their depositions, and received at the trial subject to the defendant's objection, that *Baring Bros.* had made an advance of the £420 to the plaintiffs, and having collected from the underwriters for general average the sum already mentioned, they held the plaintiffs responsible for the balance claimed in this suit. The equities of the case, therefore, are apparent, and the point is, are we at liberty to consider this bill in the light, not so much as of a bill of exchange to be strictly handled as such according to the law merchant, as of an assignment or appropriation of the freight, which *pro tanto* has failed.

*James E. Brett* says that the captain was to make the draft good by remitting his freight—his funds—to *Baring Bros.*; he agreed so to remit his funds to make the draft good; but *Mr. Brett* adds: "the draft was never paid." He admits the settlement by the draft; that settlement was in full of all accounts, and the goods shipped to the defendant were included therein. The same language is used by plaintiffs' book-keeper, who heard the defendant say he would pay for the goods by drawing on *Baring Bros.*, and to meet the draft he would instruct the captain to remit his freight, or enough to meet the draft, on his arrival at *Nantes*, to *Baring Bros.* Here was a special agreement by which the defendant constituted *Baring Bros.* his agents as much as the plaintiffs. There is no reason to believe, either, that the defendant and his master did not do their best to carry it out. The fund unfortunately failed on which both plaintiffs and defendant relied, and it is obvious enough on which party the loss should fall. The account given by the defendant at the trial, and the accounts in his equitable plea, are quite inconsistent with the facts as they are in proof, and of which there cannot be a doubt. It is clear that the plaintiffs never effected insurance on the freight, nor agreed to effect it. It was as much their interest as the defendant's that the injury to the vessel should have been treated as a total loss. It is not the

fact that the plaintiffs compromised the claim. The compromise was a misfortune for which they were in no ways answerable; and in view of the whole transaction, and the agreement entered into by the defendant in person, but defeated by circumstances which neither party could control, we think the plaintiff entitled to our judgment. We cannot help adding that the accounts on which there was no question ought to have been admitted. Notwithstanding the mass of papers, the essence of the case is contained in a dozen lines, and a very heavy expense might have been saved.

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### McKAY v. CAMPBELL.

*Accor for deceit on representations of defendant with regard to the sale of a mining property. The declaration alleged that the representations were made by defendant falsely and fraudulently to induce plaintiff to act upon them, and that having acted upon them the plaintiff had thereby suffered loss and damage.*

*Held, on demurrer, that the declaration was sufficient, although it did not contain any allegation that the defendant knew the representations so made by him to be false.*

DESBARRES, J., now, (December 30th, 1871,) delivered the judgment of the Court:—

The plaintiff has brought the present action to recover damages for a loss sustained in purchasing a mining property on the representation of the defendant that it was very valuable, when in point of fact it was utterly worthless. The question to be considered is whether the plaintiff's declaration is sufficient to entitle him to maintain the present action, or whether, assuming the matters and statements therein set forth to be true, he has in law no redress for the injury he has sustained in consequence of the misrepresentation of the defendant in relation to the property which he declares he was induced to purchase on the belief that the representations made to him were true. The main ground of objection to the declaration is that it does not contain any allegation that the defendant knew the representations therein set forth as having been made by him were untrue, and that however much the plaintiff may have been misled and injured by having acted upon them, he is, in law, without

a remedy. The case of *Pasley v. Freeman*, 3 T. R., 51, is the leading case on the point under consideration. That was an action for wrongfully and deceitfully encouraging and persuading the plaintiff to sell goods to a person upon trust and credit, and falsely, deceitfully and fraudulently asserting and affirming that such person could safely be trusted and given credit to, when he was wholly unable to pay for the goods. It was held that the action was maintainable on the ground of deceit in the defendant and injury and loss to the plaintiff. It is true the declaration contained the allegation that the defendant well knew that the person to whom the credit was given was not a person safely to be trusted, but the learned Judges expressed their opinions that when the party making the representation *had an interest* (as the defendant in the present case had), it was sufficient to allege that the representation was fraudulently made. It was objected to the declaration in that case that if there was any fraud the nature of it ought to have been stated, and, in answer to that objection, *Bullen, J.* observed that the cases to which he referred, which need not here be repeated, proved that the declaration stated more than was necessary, for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter* would be sufficient to support the action. *Ashhurst J.*, in the same case says, that "a fraudulent affirmation when the party making it has an intent, is a ground of action," as in *Risney v. Selby*, Salkeld, 211. Lord *Kenyon* said, it had been laid down by Lord Chief Justice *Comyns* "that an action on the case for a deceit lies where a man does any deceit to the damage of another," and he added that in 3 *Bustr.*, 95, it was held by *Croke, J.*, that fraud without damage or damage without fraud gives no cause of action, but where these two concur there an action lieth. This case shews that where the representation made is alleged to have been fraudulent the declaration is sufficient without alleging a *scientia*.

The case of *Haycraft v. Creasy*, 2 East., 92, which was cited at the argument was decided on a different ground from *Pasley v. Freeman*. In the former the defendant had no interest. He was applied to for an opinion as to the circumstances of *Miss Robertson*, and he gave it honestly, although it was a mistaken one, and the verdict for the plaintiff was set



aside because the representation made by defendant appeared to have been made *bond fide* and without any intention to deceive or defraud the plaintiff. In the latter the doctrine laid down was that without fraud there was no cause of action, and we must see whether the declaration in the present case distinctly charges the defendant with making a fraudulent representation by which the plaintiff was induced to purchase the property in question and thereby incurred a loss. My own impression is that the words in the declaration unmistakeably charge the defendant with deceit and fraud, and that it was not, for that reason, necessary for the plaintiff to allege that the defendant made the representations knowing them to be untrue. In *Adamson v. Jarvis*, 4 Bingham, 66, there was no allegation of fraud or *scientia*, and no such allegation was necessary, it being a case of a different character from those I have referred to and not applicable to the present case. *Foster v. Charles*, 6 Bingham, 396, not cited at the argument, was an action of deceit in representing to the plaintiff a person for employment as having an excellent connexion in the plaintiff's line of business. In that case *Tindall*, C. J., says: "it has been urged that it is not sufficient to shew that a representation on which the plaintiff has acted was false within the knowledge of the defendant and that damage has ensued to the plaintiff; but that the plaintiff must show the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive if what the defendant says is false within his own knowledge and is the occasion of damage to the plaintiff. *Parke*, J., in the same case, says: "An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for defendant that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true as in the representation of what is false. If a man professing to answer a question selects those facts only which are likely to give a credit to the person of whom he speaks and keep back the rest he is a more artful knave than he who tells a direct falsehood." See also *Polhill v. Walter*, 3 B. & Ad., 114, and *Corbett v. Brown*,

8 Bing, 33. The case of *Freeman v. Baker*, 5 B. & Ald., 797, also cited at the argument, only decides that an action of deceit does not lie against a person making an untrue representation to another, on the faith of which the latter acts and thereby incurs damage, if the party making such representation did not know it to be untrue. That principle is not disputed; but it does not touch the present inquiry as to the necessity of alleging a *scientia*. *Taylor v. Ashlon*, 11 M. & W., 401, was an action on the case to recover compensation from the defendants who were directors of the Commercial Bank of England, for a loss sustained by the plaintiff in respect of shares in that bank which the plaintiff alleged he had purchased and retained on the faith of representations alleged to have been made by them in a report which was published stating that the bank was in a flourishing state when it was not. It was alleged that this report was calculated to induce persons to buy shares, and that it was published by the defendants *fraudulently with the view to induce persons to buy shares*, and that the statements contained in that report *were untrue at the time of the publication*.

The principal objection on a motion for a new trial was that the Judge had misdirected the jury in telling them that it was necessary they should be satisfied that a fraud—that is, a moral fraud, had been committed by the defendants. It was contended that it was not necessary moral fraud should be committed in order to render those persons liable, for if they made statements *for their own benefit which were calculated to induce another to take a particular step, and if he did take that step to his prejudice, in consequence of such statements, and if such statements were false, the defendants were responsible, though they had not been guilty of any moral fraud*. Parks, B., in delivering the judgment of the Court, expressed their dissent from that proposition, saying that it was the opinion of the Court that no one can be made responsible for a representation of this kind unless it be fraudulently made. Upholding the doctrine laid down in *Pasley v. Freeman*, which he said was to be considered established law. He added “that it was not necessary to show that the defendants knew the facts to be untrue, *if they stated a fact which was true for a fraudulent purpose, they at the same*

*time not believing the fact to be true."* In *Collins v. Evans*, 5 Q. B., N. S., 820, error from the Queen's Bench to, and decided in 1844 in, the Exchequer Chamber. The case was brought up on the record in *Evans v. Collins*, the grounds assigned being that the declaration was not sufficient in law, and that the third plea showing absence of knowledge was sufficient. It appears from the judgment of *Tindale*, C. J., who delivered the judgment of the Court, that the question before the Court was whether the defendant, having reason to believe, and actually believing, a fact to be true, and representing it as such to the plaintiffs, was liable to an action if it turned out in the event that he was mistaken—that is, whether falsehood in a statement without fraud was actionable. He remarked that the current of authorities from *Pasley v. Freeman* downwards had laid down the general rule of law to be *that fraud must concur with the false statement* in order to give a ground of action; that in *Pasley v. Freeman* the defendant knew that the statement which he had made was false, and the action was held to be maintainable; and in *Haycraft v. Creasy*, the defendant made a false representation, but did not know it to be false, on the contrary he believed it to be true, and it was held no action would lie. The Court of Queen's Bench having given judgment for the plaintiff below, notwithstanding that a verdict was found for the defendant on the issue on the third plea on the ground that such plea afforded no legal answer to the plaintiff's action, the Court of Exchequer reversed that judgment, thus giving its sanction to, and leaving the doctrine laid down on this point just as it had previously been held to be.

I will now refer to the case of *Evans v. Edmonds*, 13 C. B., 777, which was one of the cases cited at the argument. That was an action of covenant brought on a deed of separation, by which the defendant covenanted to pay the plaintiff, as trustee for his wife, certain quarterly payments; the defendant pleaded that he was induced to make the indenture, and to covenant as in the declaration mentioned, through and by means of false and fraudulent misrepresentations of the plaintiff, by him made to the defendant, viz., that the plaintiff before and at the time of the making of the indenture by defendant *falsely* and fraudulently represented

to defendant that *Elizabeth Edmonds*, the wife of defendant, was a virtuous and moral person, and that he, the plaintiff, was a moral person, and fit to be and act as trustee for his wife for the purposes in the indenture mentioned; whereas in truth the defendant's wife was not, nor was the plaintiff a virtuous and moral person, &c.; that the plaintiff had then treacherously and perfidiously seduced *Elizabeth Edmonds*, so being the defendant's wife, and subsequently to the marriage; which last mentioned facts the plaintiff before and at the time of the making of the indenture had concealed from the defendant; that plaintiff fraudulently procured the defendant to make the indenture, in order that he, the plaintiff, might seduce away the said *Elizabeth Edmonds* from defendant, and might harbor and have access to her for the purpose of continuing the adulterous intercourse; and that defendant was induced to make the indenture in the declaration mentioned, and to covenant as therein alleged, through and by means of the said false and fraudulent misrepresentations of the plaintiff, and by reason of the concealment and suppression as aforesaid of the premises so suppressed and concealed, as in the plea mentioned, and in ignorance thereof, and not otherwise. The jury having found this plea proved, it was held on motion for judgment, *non obstante veredicto*, that the plea sufficiently showed the deed to be so tainted with fraud as to be incapable of being enforced in a court of law, and that the plea might be sustained as a general plea of fraud, notwithstanding the absence of a direct averment that the plaintiff knew at the time he seduced *Elizabeth Edmonds* that she was the wife of the defendant. The Court in that case went very much further in sustaining the defendant's plea than it is necessary for us to go in order to sustain the declaration in this case. There the defendant had no interest (unless it was to continue his criminal intercourse) in inducing the defendant to execute a deed to him in trust for the benefit of defendant's wife. Here the defendant had a direct interest in inducing the plaintiff to purchase the mining property at a large price, for he admits by the demurrer that he retained a large portion of the purchase money paid to him by the plaintiff for his own use, which is nothing less than an admission of fraud, rendering,

according to the doctrine laid down in *Pasley v. Freeman*, the allegation of a *scienter* unnecessary. In *Pewteris v. Austen*, 6 Taunt., 522, an action for deceit, the plaintiff declared that he had employed the defendant to obtain for him a new lease of certain premises from his lessor, that the defendant falsely and fraudulently represented to him that his lessor required and was to be paid a premium of £150 for granting such lease, whereas only £100 was to be paid, by means of which false and fraudulent representation the defendant obtained from plaintiff £50, and converted it to his own use. *Held*, that these allegations were sufficient without further stating that the £50 so obtained was over and above the £100 to be paid for the lease. In *Gerhard v. Bates* 2 E. & B., 488, Lord Campbell, C. J., says, "that if A fraudulently makes a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B. believing it to be true, does act upon it, and thereby suffers a damage, B. may maintain an action on the case against A. for the deceit, there being here the conjunction of wrong and loss, entitling the injured and suffering party to a compensation in damages." *Murray v. Mann*, 2 Exch., 538: "The wilfully telling an untruth to a party to induce him to alter his condition, whereby he is induced to alter it, is a fraud for which an action of deceit will lie."

I come now to the case of *Behn v. Kemble*, 7 C. B., N. S., 260, decided in 1859, upon which the learned counsel in support of the demurrer strongly relied at the argument. I have read that case carefully, and have failed to see in what respect it militates against the well settled doctrine laid down in all the cases from *Pasley v. Freeman* downwards, that to maintain an action for a misrepresentation it must be alleged that the party making the representation knew it to be untrue, or that it was made with a fraudulent intention to induce another to sell on the faith of it, and to alter his position to his damage. So far from militating against, the case of *Behn v. Kemble* is in perfect accordance with the previous decisions. *Erle*, C. J., in delivering the judgment of the Court, said that the third count of the declaration which was demurred to was bad, adding these words: "That count does not allege any fraudulent representation by the defendant, nor any scienter, nor

*does it aver that the representation was made to the plaintiff."* The case now under consideration is a very different case from that. The declaration does not allege a *scienter*, but it does allege that the representations made by the defendant to the plaintiff were made falsely and fraudulently to induce him to act upon them by purchasing the mining property in question for \$6000, when it was in fact and in truth of no value at all; and that while the plaintiff was thereby led to believe that the defendant in negotiating for such purchase was acting in his interest and as his agent, he was in bad faith acting as the agent of the owner of the property, and wrongfully kept and retained a large portion of the money placed in his hands for the purchase to his own use, to the great loss and damage of the plaintiff.

Regarding the representations set out in the declaration as having been fraudulently and falsely made by the defendant, as they are alleged to have been, I am of opinion that the declaration is good, and that the judgment of the Court must be for the plaintiff.

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### ATKINSON v. GOULD ET AL.

In an adjustment of accounts between plaintiff and defendants, a promissory note made by defendants in favor of plaintiff was delivered up to them with a receipt in full endorsed upon it and signed by plaintiff. Immediately after the adjustment the plaintiff discovered that a mistake had been made in the settlement, and at once applied to have it rectified. This was refused, and he then brought action on the note. On the trial the defendants produced the note under notice to produce, and the plaintiff having testified that he had put the endorsement on under a mistake, tendered evidence of the mistake itself. The Judge rejected the evidence, and also evidence of what one of the defendants had said when informed of the mistake, and charged the jury that plaintiff's only remedy, "any, was in Equity.

*Held*, WILKINS, J., *dissentiente*, that the evidence should have been received, and that plaintiff could maintain an action at Law upon the note, as well as proceedings in Equity to rectify the mistake.

RITCHIE, J., now, (December 30th, 1871,) delivered the judgment of the Court:—

This was an action brought by *Alfred Atkinson* against *Mary and William Gould* for the amount of a promissory note for £31 15s. 10d., which they had given him on the 24th September, 1861, and was tried before Mr. Justice *Wilkins*, at *Amherst*. It appears from the evidence that a settlement

took place between the parties when the note was given up, with an endorsement on it, "Received payment in full, February 7th, 1867," which was signed by the plaintiff. At the same time settlements took place between the plaintiff and *William Gould*, of transactions between them, and also between him as administrator of *Joseph Gould*, deceased, and *Mary Gould*, *William Gould* and *Joseph Gould*, of matters connected with the estate. Immediately after the settlement plaintiff discovered that a mistake had been made in the settlement, which he at once applied to have rectified.

On the trial the defendants produced the note under notice from the plaintiff to produce, and when the plaintiff had testified that he had put the receipt on it under a mistake, his counsel desired to give evidence of the mistake in the settlement on which the note was given up, and in what the error consisted, viz., the price of several head of cattle twice credited, the learned Judge ruled that he could not do so, it having been shown that there was a settlement in writing, and the note in question receipted in full, and given up to defendant in pursuance of it. The learned Judge also declined to allow evidence to be admitted of the answer which defendant, *William Gould*, made when informed of the error, and in his charge to the jury instructed them that the action on the note which had formed with other notes not produced and in a case where to some extent other parties were concerned, the subject of a final settlement between the parties a note produced under notice by defendant, to whom it had been given up, and when produced by them having endorsed on it a receipt in full, could not be maintained, the plaintiff's only remedy, if there really was a mistake, being by a proceeding in Equity founded on the mistake, and apprising the defendant of what it consisted.

The pleas put in by the defendant were, 1st, that they did not make the note declared on; 2nd, payment; and 3rd, the statutes of limitations. It can, I think, hardly be contended that if, on the adjustment of accounts and a settlement between parties, a mistake has been made, such, for instance, as an error in addition, or that the same articles could be charged or credited twice, an action at law may not be maintained on the original cause of action, whether it be an account

or a note, and the error shown, though a receipt in full may have been given; in other words, that the proof that a settlement had taken place, and a receipt in full given would not necessarily be a bar to the action; and if in this case the settlement had been between the plaintiffs and defendants alone and the note receipted but not given up, an action could be maintained on it, and the receipt, if relied on as a defence, could be shown to have been endorsed by mistake. If this be so, and the cases, I think, establish it, the question here will be whether the delivery up of the note in consequence of a settlement made under a mistake, precludes the plaintiff from bringing an action at law on it, and whether the settlement having embraced the adjustment of accounts between other parties affects his right to do so, and to open up the settlement.

The case of *Skaipe et al v. Jackson*, 3 B. & C., 421, shows that a receipt is no discharge to an action at law, and cannot be pleaded in bar; as *Abbott*, C. J., there said, it is no more than a *prima facie* acknowledgment that the money has been paid, and *Littledale*, J., nothing more than a parol acknowledgment of payment. *Foster v. Dawber*, 6 Exch., 848, where a receipt in full was relied on as conclusive, *Parke*, B., held that it was competent for the parties to contradict such such a receipt; and in another case Lord *Denman*, C. J., said, "in all cases a receipt signed by a party, like any other statement by him, and produced afterwards to effect him, is evidence, but evidence only, and capable of being explained." A distinction was attempted to be made in *Graves v. Key*, 3 B. & Ad., 318, between a receipt generally and one endorsed on a bill of exchange, or promissory note, as affecting the right of action. The action there was brought on a bill of exchange and a promissory note; on the back of the note when produced at the trial there was a memorandum at the foot of the several instalments, stated to have been received from A. to this effect, "Received £60 14s. 1d. for the balance, &c., with the words "from A.," struck out and a similar memo. on the bill, of a receipt for £31 5s., without any statement from whom received, and on both the balance was said to include interest and noting. Lord *Tenterden* on the trial was of opinion that these being negotiable instruments, and



all interest and principal appearing by the memorandum indorsed to have been fully paid, they must be deemed to have been satisfied and paid by the acceptor and maker, and no action could be maintained on them, and directed a nonsuit. *Scarlet* obtained a rule for a new trial on the ground that the receipts indorsed on the bill and note were not conclusive. Lord *Tenterden*, after argument, said "the rule must be made absolute, we all think after full consideration that the action is maintainable." A receipt may be contradicted and explained, and there is no case to our knowledge in which a receipt on a negotiable instrument has been considered to be an exception to the general rule.

These cases thus establishing that a receipt in full given by a party does not preclude him from recovering in an action at law, on his showing that it was given under a mistake, and that the indorsing such a receipt upon a note or bill has not the effect of cancelling it, so as to prevent an action being brought upon it, if in the hands of the plaintiff, then does the fact of the delivery up of the note to the maker, if shown to have been done under a mistake, have that effect, when, on the mistake being made apparent, the retaining it by the maker would be improper? In *Smith v. McLure*, 5 East., 476, the plaintiff declared on a bill which had been delivered to defendant for acceptance, and the pleadings did not show that he had re-delivered it. It was urged on demurrer that it did not appear but that the defendant had kept the bill when it was delivered to him. Lord *Ellenborough* held that, if, after acceptance of the bill, the acceptor improperly detained it in his hands, the drawer might nevertheless sue upon it, and give notice to produce the bill, and on his default give parol evidence of it.

If the evidence proposed to be adduced in this case had been admitted, and had established the fact of the error in the adjustment of the accounts, and that the amount of the note was still due, and that but for such error the note would not have been given up, the plaintiff would not lose his legal right to sue on it, and, as in the case last referred to, could require the defendant to produce it or be allowed to give secondary evidence. I have not referred to cases on lost negotiable notes which the plaintiff was unable to produce on

the trial, and on which a defendant might be liable to be sued in the hands of another holder, as they are in my opinion not applicable to the present case.

There is a view to be taken of this case which, though not urged at the argument, is worthy of consideration. The note on which the action was brought was produced by the defendant under notice to do so from the plaintiff, and the only pleas independently of that of the *Statute of Limitations*, which does not affect the case, were, 1st, that the defendant did not make the note, and, 2nd, payment. The making of the note was established, and surely it was open to the plaintiff to show that the amount had not been paid, notwithstanding the receipt on it, otherwise we must hold it to be an estoppel. If the defendant had desired to rely on the settlement and delivery up of the note, he should have put that defence on the record. In *Charnly v. Grundy*, 14 C. B., 608, an action by executor of payee against the maker of the promissory note, defendant pleaded that he did not make the note; the note was lost, and defendant's answer in Chancery was put in to show his admission to that effect on the part of the defendant. It was submitted that plaintiff was not entitled to recover without producing the note. *Jarvis, C. J.*—"The issue to be tried is whether or not the defendant made the note." *Williams, J.*—"I am of the same opinion; the issue of fact which the jury had to try was simply whether or not the defendant made the note. It was the duty of the Judge to try that issue according to the ordinary rules of evidence. The condition for the reception of secondary evidence having been complied with, I think my brother *Creswell* would not have been warranted in refusing to receive it."

It was contended at the argument that the settlement having been in writing, no parol evidence could be given concerning it, but I can see no proof of the settlement having been reduced to writing so as to shut out the evidence offered on the trial. Nothing further is stated than that *Mr. Townshend*, who was acting on behalf of the defendant at the settlement, made a statement in writing and took a receipt in full, and the plaintiff says he signed no written statement.

As regards the objection that the settlement embraced the adjustment of accounts between other parties than the plaintiff and defendants, I think it was open to the plaintiff to show that the error was not in the adjustment of the accounts between himself and *William Gould*, nor between himself as administrator of *Joseph Gould* and *William, Mary and Joseph Gould*, but in the settlement between himself and the two defendants in this action; and there is nothing in the evidence to lead to the conclusion that other parties would be affected by rectifying an error in the account between them, and though other notes are referred to, they were connected with the other accounts, the note in question being the only one connected with that between the plaintiff and defendants.

Since the argument, our attention has been called to the case of *McKellar v. Wallace et al.*, 8 M. P. C. C., 378, which I have carefully read, but I cannot see its application to this case. There, on a settlement between the parties, instead of going through their accounts and comparing and adjusting them; to ascertain the correct balance the one party agreed to pay and the other to receive a certain sum in full of all demands, for which a bill of exchange was given at 18 months, and no objection was made to the settlement for upwards of a year, when the parties having quarreled the drawers of the bill repudiated the settlement, and an action having been brought on the bill, the plaintiff recovered, as he manifestly was entitled to do, and while it was assumed that a Court of Equity has jurisdiction in setting aside settlements when made under a mistake or fraud, whether redress would be afforded would depend on the particular facts of each case; but nothing is there said which would lead to the inference that in a case like the present the plaintiff would not be entitled to his legal remedy on the note.

WILKINS, J., *dissentiente*.—It appears to me only necessary to state the facts of this case accurately to shew that the view of his duty in relation to it taken by the Judge at the trial was the only view of it that he could take consistently with the principles.

The plaintiff having had dealings with the defendants partly in their private capacity, and partly in a representative character that they bore, and holding at the time the note in question, with other notes drawn by these defendants, and and also a note of defendant, *William Gould*, alone, a note not sued on; met the defendants at his own house for the purpose of settlement (he being at the time in impaired health, and as it would appear, scarcely fit for business). *Mr. Townshend*, a barrister, was present, acting for the defendants, and as the plaintiff represents him to have done all the figuring, probably taking an active part for them. The matter of the settlement respected to some undefined extent one *Joseph Gould*, present at it, but not a party to the action. The plaintiff produced the notes and his book, and an adjustment took place. The result was (right or wrong), that after the plaintiff had credit for the notes (that which is the subject of this action being one of them), a final settlement, as he acknowledges, was made. A small balance was found against him, and the notes receipted in full were given up by him to the defendants. On the following morning the plaintiff repudiated the settlement, notified *Mr. Townshend* that he had made it under a mistake, and desired to have it rectified. In this state of facts the plaintiff sued on the note, and on that alone. The defendants pleaded (among other things), "that they did not make the note," and that "they had before action, satisfied and discharged the plaintiff's claim by payment." The plaintiff did not avail himself of sec. 44 of chap. 124, and reply facts to avoid the second plea on equitable grounds, therefore, the only questions raised were on the issues, 1st, was the note made by the defendants? 2ndly, was it paid in fact? The issue presented no question as to whether the payment in fact was a payment made by the settlement, by mistake, surprise or fraud; no equitable question was raised by the pleadings.

At the trial the defendants, under a notice, produced the note, as they were necessitated to do to maintain their second plea. On being produced it showed a receipt in full endorsed over the plaintiff's own hand. He insisted that he could show the settlement to have been made under mistake, and so avoid the receipt. The Judge, in view of the pleadings

and the facts, refused to allow him to do so, thinking *that* a proper matter for a Court of Equity alone, especially as the pleadings gave the defendants no notice of such a proceeding on the part of the plaintiff being contemplated, in order to open up the settlement and rescind it. Now I will assume that at least elements of mistake and surprise did in fact enter into the settlement in question, and that therefore it might be rescinded; that as a necessary consequence of such decision, it would appear that the receipt was endorsed under mistake, and that the note ought to be restored to the plaintiff discharged of the receipt, as an unpaid and subsisting instrument. Nevertheless, assuming all this, I can scarcely conceive a more startling proposition than that the note in question could form the legitimate subject of an action *at law* against the drawers of it, and that on its being produced under notice of the defendants at the trial, with a discharge in full shown, the whole subject of the settlement could be opened up by the Common Law Court at the instance of the plaintiff, and that without an equitable plea, in order to determine whether he had, when he commenced his suit, a right of action against these defendants on this note then in their hands and unproducible by him.

Where the holder of a note has been deprived of the possession of it by force or fraud, one understands that he should be permitted to sue the party so having obtained it and withholding it wrongfully from the rightful owner; but that the holder of such an instrument having delivered it even by mistake to the party once liable on it, should be enabled to sue that party on it before he has been re-invested with the possession of it, is a proposition that I have never seen an authority to support, and until this case came under my notice, I should not have supposed that it could be seriously entertained.

I shall show presently that it is clear law, as the result of a decision in *England* on that very point, that no action will lie on a note *negotiable though not in fact negotiated*, where the party who sues on it is unable to produce it at the trial. But I prefer, first, to consider this case as if there were no such rule. What has this plaintiff assumed when he brought this action, and what is it that he demanded and the

Judge refused at the trial? He treated as void, when it clearly was only voidable, a settlement made in fact, which affected others besides the parties to the record, a settlement evidenced to some extent by matter in writing not produced at the trial, a settlement which embraced other notes of those defendants, and a note also drawn by one of them alone. He treated as a subsisting security, and as an instrument in his possession the note in question, which was at the time of action brought a note under the control of the defendants, and placed in their possession by the plaintiff's own act. He treated as an unpaid note this note, having a receipt in full, written and signed by the plaintiff, and deliberately, although it may have been unwisely, handed over to the defendants as the result of a settlement unrescinded at the issuing of the writ. He did not frame his declaration on a special statement of the circumstances. He did not even demand the note from defendant before the institution of this suit. He did not give the defendants the slightest intimation by the pleadings or otherwise to prepare themselves at the trial to meet his attempt thereat to open up the details of the settlement in order to rescind it, but he based his right to do all that he required to be done at the trial on his naked allegation, "that the defendants are indebted to him, for that they by their note promise to pay the plaintiff or order £31 15s. 10d." He knew his asserted claim on the note would be met by the receipt,—a receipt which must stand against that claim until not merely the receipt, but the whole settlement which was concluded by the receipt was shown to be erroneous. His proceeding, therefore was not a Common Law claim with an equitable claim mixed up with it, but, viewed in its true light, neither more nor less than an attempt to obtain equitable redress in a Court of Common Law, and by by means of an action on a promissory note. The Common Law Court had neither the jurisdiction or the machinery, or the necessary parties before it to re-consider and re-adjust that settlement. An Equity Court alone had jurisdiction, after that result was achieved by its instrumentality, to order the note in question to be delivered up to the plaintiff discharged of the receipt. Mere receipt for money, viewed *per se*, is of course not conclusive; but it is a palpable fallacy to

contend that this receipt can be questioned until the whole settlement of which it is a mere consequence or sequel is shown to be erroneous. Until then the defendants have at least as much right to insist on the receipt as the plaintiff has to insist on the note as valid. Each forms a part of an unrescinded settlement. Their rights being thus the same relatively to note and receipt, the one neutralizes the other, so that nothing remains open. Nothing was open when the writ issued but the question of the settlement.

On the part of the plaintiff's asserted right to maintain the action on the note in question, stated on the record to be a note payable to the plaintiff or order, the authorities are decisive to shew that the fact was within his own knowledge and admitted at the trial that when he commenced the suit he had it not in his power to produce the note; having no legal control over it constituted such a legal defect in his case as prevented his compelling payment of the note. Although it was endorsed, no plea to that effect is recorded. *Coleridge, J.*, in pronouncing the reversing judgment in the Exchequer Chamber in *Crowe v. Clay*, 9 Exch., 609, said, "To entitle the plaintiff to sue he must be the holder of the bill, and the defendant may rely on this defect in the plaintiffs' title."

In *Crowe v. Clay*, *Wrightman, J.* (the question of law arising in that case on a demurrer) says: "It is consistent with every allegation in the plea that the bill was unindorsed." Then, according to *Ramsey v. Crowe*, 1 Exch., 167, a person who has lost a negotiable bill, though it is unindorsed, cannot by the law merchant compel payment of it. This is a settled law on the authority of the above cases and of *Hansard v. Robinson*, 7 B. & C., 90. In *Ramuz v. Crowe*, the words of *Parke, B.*, are: "The bill accepted by the defendant was *negotiable* not negotiated, and the plaintiff, by reason of the loss of it, being unable to produce it to the defendant cannot, by the law of merchants, compel him to pay the amount." The principle of the rule is, as stated by *Abbot, C. J.*: "That the Law Merchant requires the instrument in every case but the exceptional one of a mere note between the parties, and not negotiable, to be produced at the trial, or where payment of it is demanded."

*Roscoe*, (last edition), at page 322, thus states the effect of the case of *Crowe v. Clay*, referred to above: "The loss of a bill in a negotiable state is, at law, fatal to a recovery as well on the bill as for the debt for which it is given."

The cases referred to settling the principle are comparatively recent. But before it had been held that a bill or note negotiable, though not in fact negotiated, could not be sued on unless the plaintiff could produce it at the trial, there had not been a question on the point relatively to a negotiable note negotiated. In *Davis v. Dodd*, 4 Taunt., 602, it was decided that payment of a bill of exchange cannot be enforced without producing the bill, and that an express promise to pay such bill if given, without some new consideration, was void.

The bill in question in this action is a note drawn payable to the plaintiff *or order*. When sued on, it was not under plaintiff's control, but actually in the hands of defendants, in whose hands he had placed it; and when the defendants produced it at the trial, under notice, it shewed on the back of it a receipt in full signed by the plaintiff. To maintain that when thus produced the plaintiff could adopt it and defy a nonsuit without adopting and admitting, for the purpose of the action on the note at least, the discharge also, would be a proposition revolting to right and justice as well as to a plain principle of common law.

In the case of an action at common law on a mere promissory note, the production of the instrument with a receipt in full on the back of it, signed by the drawer, would come within the scope of those words of Lord *Kenyon*, which I find thus commended by Lord Chief Justice *Eyre* in *Gibson v. Hunter*, 1 H. B. L., 192. Lord Chief Justice *Eyre* said: "As to the moral estoppel, I will cite the concluding words of a judgment pronounced against a plaintiff by a noble and learned Judge in the name of the whole Court of King's Bench. The defence which is made is of a most unrighteous and unconscientious nature, but unfortunately for the plaintiff the mode which she has taken to support her demand cannot be supported, and consequently there must be judgment for the defendant." "That noble and learned Lord," continued Lord Chief Justice *Eyre*, "was perfectly correct. Where the



plaintiff cannot shew a *prima facie* case, the defendant is not driven to plead anything; he demands the judgment of the Court upon the plaintiff's own case."

It only remains to be said that section 10 of chapter 11 of the *Acts* of 1866, (viewed in connection with section 44 of chapter 124, *R. S.*, in the former section referred to) even if there had been (as there was not) "a replication by the plaintiff on equitable grounds, would have made it a matter of pure discretion with the Judge to try the question of equitable jurisdiction, or the mixed questions of law and Equity, or remit the subject matter to the jurisdiction of the Equity Judge."

For these reasons I am of opinion that the rule should be discharged.

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### WINDSOR MARINE INSURANCE COMPANY v. LADD.

THE plaintiff Company, in order to prove a certain notice, called their Secretary, who testified to the loss of the original, and to a sufficient search having been made for it. On cross-examination he stated that he did not know from whom he had received the original, nor in whose hand-writing it was. The paper was tendered, objected to, and rejected, and the Judge also refused to permit the plaintiff then to introduce further evidence to prove it. The plaintiffs also offered answers to interrogatories by one of the defendants, which were on file; and the answer of another of the defendants, which had not been filed, but which was admitted. These were rejected. The plaintiffs thereupon became *non-suit*.

*Held, WILKINS, J., dissentiente*, that the discretion of the Judge, as to the further examination of the witness, had not been properly exercised, that the answers of the two defendants should have been received, and that the *non-suit* should be set aside.

YOUNG, C. J., now, (December 30th, 1871,) delivered the judgment of the Court:—

This is a rule to set aside a nonsuit, involving questions of practice of very considerable moment. It was essential to plaintiffs' case to prove a notice of abandonment of a vessel called the *Wanderer*, and their Secretary, *Mr. W. H. Blanchard* having testified to the loss of the original, and a sufficient search for it in his office, left the stand, as it would seem from the Judge's notes, without having stated that he knew the handwriting of the party by whom the notice was given. *Mr. Blanchard* was then examined and cross-examined on other points,—on what principles does not appear—and then the plaintiffs' counsel offered the interrogatories which had

been authorized by an order in the cause, and the answers thereto which were on file. He offered, also, the answer of another of the defendants, not filed, but admitted to be signed by him from one of the papers. These were objected to on grounds which do not appear on the minutes and were not received, whereupon the plaintiffs became nonsuit, and upon the argument of the rule *nisi* they contested the legality of those decisions at the trial.

The merits not being in proof this is the sole question before us. In some cases the exercise of his discretion by a Judge is final, as where he rules against a stamp objection (*Byles on Bills*, 113,) or quashes or refuses a certificate for costs (*McGilivray v. McIsaac*, James Reps., 155; see, however, *Horde v. Sheppard*, 25 L. T. R., N. S., 501). In other cases, as in refusing or granting amendments, a review of his decisions by the full Court is of familiar practice. In others, again, the decision of a Judge is rarely interfered with. The recalling of a witness on a trial is one of those cases. The general rule is given in *Archbold*, 12th edition, 396, and in *Taylor on Evidence*, sec. 133. A recent case, *The Duke of Beaufort v. Crawshay*, L. R., 1 C. P., 699, lays down the rule substantially to the same effect. The point was the admission of the deposition of a sick person, as considered under the 1 Wm. IV., chap. 22, and *Erle*, C. J., said: "There is a strong *prima facie* presumption in favor of the Judge's ruling. The Judge before whom the matter comes for decision has the best means of deciding correctly. He has the evidence of his own eyes; the witnesses were before him, and his experience will enable him to form a more correct judgment than the Court *in banc*. can from a mere statement of what occurred at *nisi prius*. I therefore think we ought not to exercise this jurisdiction unless we are clearly satisfied that injustice will be done by abstaining from doing so." Applying these principles to the case before us, I think it unfortunate that the learned Judge, after permitting the witness to be recalled, did not permit him when he had stated his belief of the signature to the original paper being *Smith's*, to be interrogated as to the sources of that belief. That he had never seen him write was not enough,—his belief may have been founded on correspondence or other circum-

stances which would have made it evidence, but it is unnecessary that I should pronounce an opinion on this point, in the view I entertain of the other objections.

In *Adams v. Bankart*, 1 C., M. & R., 681, the Judge would not allow a material witness to be recalled for the purpose of ascertaining the exact evidence he had given on a particular point. The Judge said he could not allow a witness, after it had been seen where the shoe pinched, to be re-examined. The opposite counsel objected to the witness being re-called, and the Court said: It is quite clear that it is merely a matter of discretion. In *Cutlin v. Darkin*, 5 C. B., 201, the Judge refused to re-call a witness for the purpose of correcting a mistake, as the statement of the witness was not evidence, and the Judge had made no note of it. The jury were supposed to have been influenced by the witness's answer, but the Court thought the Judge was right. In *Middleton v. Barned*, 18 L. J. Exch., 433, the Judge would not allow a material witness to be called whom neither side had examined, and it was argued that it was a matter purely within his discretion; on which *Parke*, B., observed: "We never interfere in such cases, unless it be perfectly clear that the learned Judge has wrongly exercised it." On the right to begin the Judge has a discretionary power which the Court will not interfere with unless his ruling did clear and manifest wrong; *Brandford v. Freeman*, 5 Exch., 737. It must be shown that some injustice has arisen from the wrong party beginning; 3 Exch., 700. Where it is clear that wrong has been done by the *onus* of proof being thereby imposed on the wrong party, the Court will interpose, but not if the matter be at all doubtful.

The grounds on which the answers of the two defendants to the plaintiffs' interrogatories were rejected is not stated, as I have already said, in the minutes. The Court's order was annexed to the interrogatories on file; the contents of the answers are unknown to us, and were not referred to at the argument; and the only objection that could be argued was the want of proof of the defendants' signatures. The case was tried at *Windsor*, and the two answers were sworn to, in the county of *Digby*. It is apparent, then, that in this, as in other cases which will perpetually arise, to impose upon the

party seeking to avail himself of such answers under the statute, the obligation of proving the handwriting—which has never been held, so far as I know, to be the practice,—would necessitate the summoning of witnesses from a distance, and would practically destroy the use of such answers. The same principle, too, must extend to affidavits, though not on file in the cause. But little is to be found on this subject in the books of practice. It was held in *Price v. Hayman*, 7 Dowl., 47, that affidavits once filed may be made use of by the opposite party, and it appears from *Tidd*, 697, 800, 9th ed., that when an affidavit has been read and filed, it becomes a record of the Court, and cannot be taken off the file; *Beal v. Langstaff*, 2 Wills, 371. The only case to be found on the proof of affidavits is a *nisi prius* decision of *Martin, B.*, in *Barnes v. Peakes*, 15 L. T. R., N. S., 20, in 1866, where he held that an office copy of the defendant's affidavit, though it was duly stamped and had come from the office of the Exchequer, could not be received against the defendant, without proof of his handwriting. The Judge observed that the question had occurred once before in that Court, and asked how he could know that the affidavits were not a forgery, and that some person had not filed a false affidavit and forged the name appended to it, unless the signature was proved. There is certainly this remote possibility, and yet one would hesitate, I think, in adopting so inconvenient a rule upon the authority of a single *nisi prius* decision which, as it would seem from *Day's C. L. Proc. Act*, 260, has not been altogether approved of. I have said that the same principle extends to the affidavits filed in a cause, and to the answers put in under oath to interrogatories. The latter, however, stands on a different footing, and depends on the true construction of our own statute, chap. 135, secs. 11 to 14, and of the act of 1867, chap. 19, sec. 2. These differ considerably from the *English C. L. P. Act*, 1856, on which they are founded. Sec. 57 of that act is the origin of our sec. 11 in the act of 1867, as may be readily seen on comparing the two. One remarkable feature in ours is, that the answer may be sworn to before a Justice of the Peace, as has been done, I perceive, with one of the answers in this case. Sec. 52 of the *English Act* is not in ours; sec. 53 is nearly the same as our sec. 12; sec. 54 bears

some analogy to our sec. 14, but this and sec. 13 may be considered as peculiar to our practice. The former declares that the answers to the interrogatories in the oral examination, under sec. 12, shall be held to be taken absolutely (there being no such phrase in the *English Act*), and not *de bene esse*, unless otherwise specially ordered; and sec. 14 declares that they may be used as evidence taken under commission may be used. Is it necessary, then, before using them, to prove the signature of the deponent, which is not necessary in case of a deposition taken under commission? Or shall the filing of the answer purporting to be under the handwriting of the deponent and the officer be accounted enough *prima facie*. My own opinion inclines to this latter view, and I cannot regard the case of *Fleet v. Perrins*, 3 L. R. Q. B., 536, as inconsistent with it. There, an examined copy of answers to interrogatories made, not in the same but in a former suit, by one of the parties, was admitted in evidence against him without proving his signature to the original answers, on the ground, it is said, that it was used by him in the former action. But it does not follow that this is the sole ground. It is referred to by *Blackburn, J.*, as a recognition of a decisive fact; but no rule is laid down here or elsewhere that I have found, requiring proof of the signature, and if it were found, the question still remains of its applicability to our act. But the paper signed by *Lauld*, and which was also rejected, probably under some misapprehension, is open to no such objection. It was not sworn to, though the form of the *jurat* is attached, and must be regarded simply as a statement of one of the defendants under his hand on the subject matter of the suit, which was clearly evidence in the cause when tendered by the plaintiff. It cannot be doubted, says Chief Justice *Cockburn*, that a man's assertions or admissions, whether made in the course of a judicial proceeding or otherwise, and in the former case, whether he was himself a party to such proceeding or not, may be given in evidence against him in any suit or action in which the fact so asserted or admitted becomes material to the issue to be determined. *Richards v. Morgan*, in 4 B. & S., 641; 9 L. T., N. S., 667. If so in any other suit or action, *a fortiori*, is it not material in the same suit? We are not acquainted with the contents of this

answer, but it ought to have been received *valeat quantum*, and on this ground as well as upon the others I have mentioned, I think, there should be a new trial. Since I prepared this judgment I have had occasion to examine the original papers, and find that *Ladd's* affidavit is not imperfect, as it appears at first sight, and was represented at the argument. The name of the commissioner is at the end of the *jurat*, which, as I think, makes it still better evidence for the plaintiffs, if they chose to produce it.

WILKINS, J., *dissentiente*.—The Judge who tried this cause directed a nonsuit, to which the learned counsel for the plaintiff unwillingly submitted. The rulings which induced that result are objected to on two grounds: *first*, the exclusion of the further examination of the witness, *Blanchard*, as to the document sought to be proved by him; and, *second*, the rejection by the Judge of certain interrogatories and answers in the cause. If, under the circumstances, the Judge was bound to permit the witnesses to be further interrogated; or, if the answers were, in view of the facts reported, legal evidence, the rule to set aside the nonsuit must be made absolute. The second ground I shall consider first. The interrogatories and answers, unsupported by any other evidence, were offered by the plaintiffs' counsel, and objected to by the defendants. Thereupon the learned counsel for the plaintiff, on being asked by the Judge "what he had to say to the objection," contented himself with replying in these terms, "nothing, I tender them." On this the Judge declared that he would not receive the evidence. I am of opinion that the evidence so offered was by him properly rejected. To invest it with the character of legal evidence, advertng to the nature of it, it is at least necessary to show that the answers, from the mere circumstance of their purporting to be answers in the cause, constituted admissions in writing. But as they were not shewn to be signed by the defendants, they cannot, on any principle that I am aware of, be regarded as admissions made by them, they not being made in the circumstances which they were offered, admissions by express legislative enactment or by judicial decision giving a statute that effect. Now, so far as legislation is concerned, the only material pro-

vision is as follows: Section 14 of *Revised Statutes*, chapter 135, (not differing in substance from the corresponding rule in *England*) enacts "that the answers to the interrogatories, filed as aforesaid, (the preceding section 11 designating the place of filing to be the Prothonotary's office) may be used, as evidence taken under commission may be used."

This, (as has been remarked by *Taylor*, in relation to the *English statute*), involves a legislative inaccuracy, seeing that the prescribed regulations for taking evidence under a commission are not applicable to the case of answers of a party to interrogatories administered by the opposite party. We must, then, have recourse to principles, or to adjudicated cases. As to the former, it is clear from a mere statement of the proposition that it cannot be inferred from the circumstance of answers to interrogatories being in the cause, without proof of the party's signature, that the answers were in fact signed by him whose signature purports to be subscribed to them. These answers were offered collectively and objected to, and the plaintiffs' counsel being thereupon asked by the Judge what he had to say to the objection, said, (as has been before observed), "nothing,—I tender them." The Prothonotary of the Court, then, after the Judge had said that he could not receive the interrogatories and answers, was called, and stated: "There are papers filed in the cause, and they are annexed to the declaration. I find another paper, purporting to be answers of *Jenkins*, filed, not by me but by my predecessor, also answers of *Ladd*, not filed, but admitted to be signed by him." Then, the learned counsel might have offered the answers of *Ladd* separately, if he thought those, as distinguished from the others, had claims to be evidence peculiar to themselves. He did not, however, tender them alone, nor did he tender the whole collectively. Again, after the evidence of *Carver*, I am not aware of any rule of judicial practice that makes it the duty of a Judge to distinguish what the counsel does not choose to point out to him as distinguishable. See *Whitehouse v. Hemmant*, 3 Hurl. & Nor., 845. That case is decisive to show that the answers of *Ladd* should have been pressed on the notice of the Judge. Clearly, too, in my judgment, the learned counsel is estopped from asserting here that his clients were prejudiced in respect of the rejection of

these documents, by the fact of his having (and with studied peremptoriness) declined the opportunity which the Judge afforded him of stating reasons in support of his claims to have all the answers, or the answers of *Ladd* alone read as evidence. The Legislature, moreover, has made the *filing* of those answers an express condition of their being received as evidence. Is this Court prepared to say that they were evidence, the officer of the Court having sworn *that they were not filed*? It must not be forgotten that the interrogatories and answers were never offered separately, but tendered as a whole, objected to as a whole, and rejected as a whole. The adjudicated cases are, as might be expected, few: my researches have discovered only two. They are *Fleet v. Perrins*, 3 L. R., Q. B., 536, and *Barnes v. Parker*, cited therein. The first is a case in which an office copy of answers to interrogatories, administered and used in a former action, since discontinued, in which the plaintiff had sued the defendant for the same money was tendered in evidence, and a witness proved he had examined it with the original answers, but he was unable to say whether the signature thereto was in the defendant's handwriting. The learned Judge admitted the copy, subject to the objection, "that the proof had not been given counsel *arguendo*." Assuming that the answers, if properly proved, might have been put in, it was necessary to prove the defendant's signature. He cited *Barnes v. Parker*, 15 L. T., N. S., 218, where *Martin, B.*, had refused to admit an office copy of an affidavit, purporting to be that of the defendant and filed in the Exchequers without proof of the defendant's signature to the original. *Per Curium*.—According to the decision in *Richards v. Morgun*, 4 Best & Smith, 641, a party using in a suit a deposition of a third person, makes that deposition evidence against himself, for all the world, as the using of it is an admission by conduct that its contents are true. A *multo fortiori*, the deposition purporting to be of a defendant, and used against that plaintiff in another action, is admissible without further proof than that it was used by the defendant in that action. Now, what can be clearer than that as *Blackburn, J.* and *Lush, J.* who sat with him, had thought that the mere fact of the answers in question being in the cause, and on file, made them evidence, no further argument would have



been required than the notice of that fact. In *Fleet v. Pervins* it was unnecessary to rely on *Barnes v. Parker*, as the fact of *user* decided the former case; but that former case intimates no disapproval of Baron *Martin's* ruling. *Martin*, B., said, in the case before him, "The question occurred once before in this Court; and I thought then, and think now, that an affidavit cannot become evidence against any person, (and the affidavit had been made in the cause by the defendant) without proof of his hand writing, no matter where it came from." "How could I know," continued he, "that the affidavit was not a forgery and that some person had not filed a false affidavit and forged the name appended to it, unless the signature is proved. I do not see that without proof of the writing, it can be evidence against any man." On principle and precedent, then, these interrogatories and answers were properly rejected. They couldn't have been received without disregarding both.

We must not dismiss this subject of our inquiry without considering that by our law the order of the Court or a Judge, which was not proved in this case, was necessary to authorize these interrogatories to be delivered and administered in the cause. See chapter 19, section 2, of the Act of 1807. The remaining question is, whether the refusal of the Judge to permit the witness to be further examined by plaintiffs' counsel as to the document sought to be proved by him was such an exercise of discretion as this Court can overrule. It ought to be overruled if injustice will be done by this Court abstaining from doing so. But in the language of *Willes*, J., in a case to which I shall refer, "the exercise of discretion by a Judge at *Nisi Prius* ought not to be interfered with, unless some injustice clearly appears to have been done by his having exercised it erroneously." I shall shew that in this particular case now before this Court, no serious injury to the plaintiff could possibly result, and that if it were to ensue, it would have been averted by the exercise of diligence in relation to the management of their client's cause by the learned counsel for the plaintiff. The rule moreover seeks to set aside a nonsuit by which the rights of the plaintiff would not be concluded, the question, apart from the principle of judicial practice

affected by it, involving so far as the plaintiff is concerned, a mere matter of costs.

The occurrences which mark the trial on the point of present inquiry, were as follows: The learned counsel for the plaintiff elicited from his witness—the witness in question—this evidence, viz.: “I had a paper in this office, (that of the plaintiffs’ Company), of which that in my hand is a copy—the original of it is mislaid. I have searched for it in vain. It came into my possession soon after the loss of the brigantine *Wanderer* was reported, in *July* of 1867, addressed to the President and Directors.” There the examination of the witness by the plaintiffs’ counsel in order to prove the document was at an end, so far as that object was concerned. The witness was then handed over to the defendants’ counsel, and, on cross-examination, said: “I don’t know from whom I received it. I don’t know the hand-writing. The subscription is in a hand different from that of the body.” Now, this witness was a lawyer by profession, Secretary of the plaintiffs’ Company, and presumably, therefore, interested for the Company, and yet he didn’t offer a word in qualification of his broad testimony, “I don’t know the handwriting.” Besides, neither at the close of the cross-examination, nor during the direct examination respecting the paper, did the plaintiffs’ counsel attempt to draw out of the witness his knowledge, or means of knowledge of the hand-writing, he having all the while opportunity of exhausting the witness, and it being his duty, if he could elicit any material testimony from the witness, then and there to do so, before tendering the evidence. And yet, the complaint is, that the presiding Judge so exercised his discretion that the learned counsel was by him prevented from proving the document by the witness. Had the Judge refused to permit the witness to say a word on the subject of the paper after the examination and cross-examination respecting it had closed, and the paper had been offered, objected to and rejected, he would have acted in the strictest accordance with settled practice which, obviating the inconvenience that would result from permitting repeated attempts to introduce the same document at different stages of the trial, requires a counsel to withhold it until he has, once for all, produced sufficient evidence to sustain the tender

of it. *Middleton v. Barnet*, 4 Exch., 241; *Adams v. Bankart*, 1 C. M. & R., 681; and the *Duke of Beaufort v. Crawshay*, 1 L. R., C. P., 699, are authorities shewing the reluctance of the Court *in banc.* to interfere with the discretion of a Judge exercised at *Nisi Prius*. I will shortly refer to the last mentioned case. The Judge who tried it, under 1 Wm. IV., chap, 24, sec. 10, which made the deposition of a witness inadmissible in evidence unless it shall appear to the satisfaction of the Judge that the deponent is unable from permanent sickness, etc., from attending the trial, ruled that the evidence of permanent infirmity was sufficient, and received the deposition. An appeal from such ruling was made to the Court. Erle, C. J., made these remarks, suggestive to the case now before this Court: "The Judge before whom the matter comes for decision has the best means of deciding correctly. He has the evidence of his own eye. The witnesses are before him: and his experience will enable him to form a more correct judgment than the Court *in banc.* can from a mere statement of what occurred at *Nisi Prius*." To apply this,—suppose the witness in the particular case, being an officer of the plaintiffs' Company, called by its counsel to prove a document essential to its case, interrogated on that point, stating, and being asked by the counsel, state no more than this, viz., "I don't know from whom I received the original, now mislaid, of a paper in my hand which is a copy of it. I don't know the handwriting of the original." Suppose, I say, the counsel who called the witness shewing himself content with his, as being all that the witness knew, and without even asking leave to re-examine, offering as evidence the paper; and suppose the Judge, using his eyes and ears, noting the course of the counsel, and observing in the witness great confusion of mind and manner regarding the matter of his examination, and concluding, in view of this, (much of which he couldn't repeat, and the Court *in banc.* couldn't see), that to permit the witness to be re-examined without restraint about the document would involve a trifling with the Court, and be a mere waste of time; and ruling, therefore, that a limited privilege should be granted, and confined to explanation as to something that the witness was asserted to have previously stated,—would this be an exercise of judicial discretion which

this Court ought to control? *Willes*, J. shall give an answer in words used by him in the *Duke of Beaufort v. Crawshaw*. The learned Judge said, "The Court does nothing unprecedented or exceptional in saying that they ought not to interfere, unless some injustice has been done by an erroneous exercise of discretion by the Judge at *Nisi Prius*." The learned Judge added, "If that be the rule, on whom rests the *onus* of shewing the injustice? Undoubtedly upon the person who complains of what has been done." In this case it has been shown that if any prejudice results to the plaintiff from the nonsuit it lies at the learned counsel's own door. The less is contained in the greater, and if a Judge could refuse to allow a witness to be recalled at all, it is clear that he can do what the Judge is complained of for having done in the case before the Court, viz., define and limit the interrogation of the witness permitted to return to the witness box for the purpose of such qualified further examination. The Judge, by doing this, merely prevented the learned counsel for the plaintiff from doing irregularly and out of season what he might have done, but had declined to do, regularly, and at the proper time.

These being my views, I am of opinion that the rule should be discharged.

### BENT v. BANKS.

PLAINTIFF recorded a judgment against defendant and issued execution which was returned unsatisfied. Subsequently certain real estate came into defendant's possession by devise from his father. After the expiration of a year plaintiff had this real estate levied upon and sold by the sheriff, purchased it himself, and brought ejectment against a grantee of defendant's who had the possession. He was non-suited on the ground that the sale had not been duly advertized. He then applied for leave to set aside the levy and sale and to proceed anew. Defendant resisted the application on two grounds: 1st, that the judgment did not bind the property because it had been acquired subsequently to the recording; and, 2nd, that the full amount of the judgment debt was not due. This latter ground was supported by affidavit and uncontradicted.

*Held*, that plaintiffs' application should be granted, but the matter was referred to a Master to ascertain the actual amount due, plaintiff to have liberty to issue a new execution for the amount if not paid.

McCULLY, J., now, (January 3rd, 1872,) delivered the judgment of the Court:—

This was a rule *nisi* obtained by plaintiff 1st December, 1868, upon his own affidavit, setting forth a judgment obtained

against defendant for \$104.20 and \$19.90 costs, 6th *August*, 1862, at *Annapolis*, recorded in the Registry of Deeds office (same day); that an execution issued 22nd day of *August* returned not satisfied; that an *alias* issued in *December*, 1863, with direction to sell real estate, &c. Certain real estate of plaintiff which came to him by devise of his father, as appears by affidavit on the other side, after the taking and recording of the judgment, and which defendant on the 25th *September*, 1862, conveyed to *Sydney Banks*, was advertized and sold by the sheriff, and purchased in by the plaintiff. For this he brought ejectment against *Sydney Banks*, and was nonsuited on the ground that the property had not been advertized in the local newspaper of the county, as required by statute. The object of plaintiff by this application was to obtain an order granting leave to set aside the levy and sale had, for irregularity, and to issue another execution, and proceed with a new sale. The defendant and *Sydney Banks*, called in by the rule *nisi* to show cause, resisted the application; first, on the ground that the defendant obtained title to the land after the date and registry of the judgment issued on the 10th *August*, 1862, by devise from his father, and he therefore contended that the lands were not bound nor subject to a lien by the operation of the judgment; and, 2ndly, that the amount of the judgment was not due to plaintiff, but a much smaller sum, not exceeding \$60; that defendant applied to plaintiff about the date of the issuing of the writ for a settlement, and he agreed to settle, but owing to present ill health was then unable to settle, and requested defendant to come again, which he did, when plaintiff refused to settle at all, and forthwith issued an execution.

Authorities were cited on both sides with regard to after-acquired real estate, as in this case when there was a previously recorded judgment. But inasmuch as the defendant might possess personal estate or other real estate to satisfy the judgment thereon, and it was not necessary at present to pronounce any decision as to the effect of recorded judgments upon after-acquired estate, the Court disposes of the case upon the other ground.

In order, then, to obtain justice, plaintiff desires leave to amend by having his own execution and the proceedings

thereunder set aside, with leave to issue a *pluries*. This under the circumstances is not an unreasonable request. But as the Court in all such cases possesses the power of imposing terms, they think that inasmuch as the plaintiff has obtained a judgment for a greater amount than is fairly due him, according to defendant's affidavit, which is uncontradicted, for plaintiff has not sworn to merits or verified his claim under oath, the terms he should submit to are, that it be referred to a master to take an account of what is due plaintiff from defendant, and report the same to the Court, and upon a confirmation of that report, unless the balance be paid, the plaintiff be at liberty to issue an execution.

Plaintiff's counsel, on the argument, expressed doubts as to the power of this Court to impose such terms. But this Court entertains no doubt on this point, as well under the practice adopted here as that in *England* in analagous cases, as to setting aside capiases, arrests, executions, &c., and restraining actions for false imprisonments whenever the Court considers it prudent so to do. Whenever a Court of Law can administer Equity in cases like the present, the tendency of modern decisions has been in that direction, and not to send suitors to other jurisdictions unnecessarily.

In *Kemp v. Pryor*, 7 Ves., 240, Lord *Eldon* said : " Upon what principle can it be said that the ancient jurisdiction of this Court is destroyed because Courts of Law now very properly, perhaps, exercise that jurisdiction which they did not forty years ago. Demands have been frequently recovered in Equity which now could without difficulty be recovered at Law, and I cannot hold that the jurisdiction is gone merely because the Courts of Law have exercised an equitable jurisdiction."

Then again, this is not very unlike the case where a party has neglected to issue a first execution within the time prescribed by statute, or for other cause, and resorts to revivor or *scire facias*, and in *Greenslade v. Vaughan*, 8 D. P. C., 687, the Court stayed proceedings in *Sci. Fa.* on a judgment on a warrant of attorney on a suggestion that matters occurred before signing of the judgment, from which it would appear that nothing was due to plaintiff, and referred the case to the master to report upon.

Let a rule be drawn accordingly, and in it let provision be made that on being tendered the balance due him the plaintiff re-convey or assign to *Sydney Banks* any interest or supposed interest acquired under the sheriff's deed. The costs to abide the further order of the Court.

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BOWEN ET AL. v. SHEARS.

DEFENDANT's testator in 1831 put plaintiffs in possession of certain premises, without any deed. In 1838 they executed a deed thereof to him in trust for their daughter. In 1850 he devised to defendant all his farm, &c., without excepting the portion given to plaintiffs. Plaintiffs continued in undisturbed possession until 1870, when defendant committed the trespass which was the subject of the present action. He justified under a plea of title.

Held, that plaintiffs, having had possession for twenty years after 1830, had acquired a title and could maintain their action.

DODD, J., now, (January 13th 1872,) delivered the judgment of the Court:—

Trespass by *Bowen* and wife against *Philip Shears*. At the trial of the cause a verdict was taken by consent for the plaintiffs for \$400 damages, subject to the opinion of the Court upon the whole case, with all the powers that could be exercised by a jury, and power also to set aside the verdict, or give judgment in accordance with it, or to order a nonsuit, or judgment for defendant. The facts of the case, as proved at the trial, are substantially as follows: The plaintiffs were married in 1831, and the day after the marriage *Philip Cheppard*, the godfather of the plaintiff, *Mary Ann Bowen*, for whom she had previously worked, took her to a piece of land, (that now in dispute), and said, "I am going to give you this." It was then called pasture and had a fence around it. He divided the land between her and her brother—the present defendant, giving to her one-half, between five and six acres. In 1834 the plaintiffs went into possession of the land thus made over to the wife *Mary Ann*, and continued in the quiet possession of it until the trespass complained of by the defendant in April, 1870, showing a continuous possession of thirty-seven years. The plaintiff, *Edward Bowen*, built a house on the land being urged to do so by *Cheppard*, who helped him to build the cellar, and the plaintiffs went into the

house in 1834 and occupied it from that time until five years before the trial, when they rented it at £9 a year. The defendant, *Shears*, helped to shingle the house and two years afterwards assisted to erect the barn, and since then there has been a fence around the property and the whole now under cultivation. The trespass by the defendant was proved; his defence under his plea is title; this he claims under the will of *Philip Cheppard*, who, by a will dated 29th November, 1839, devised to him all the farm the testator then owned and occupied, containing about 400 acres, with the buildings, etc., excepting out of the said devise about 2½ acres, to hold to the said defendant the said lot and premises during his natural life, and after decease, to his daughter *Mary Shears* in fee simple. When the testator made his will he had been out of the possession of that part of the property claimed by the defendant under the devise to him of the 400 acres for a period of twenty-eight or twenty-nine years, unless, under the conveyance, to which I will presently refer, he became reinvested of the property he gave to the plaintiff's wife in 1831. A deed dated 26th October, 1838, was proved on the defence, between the plaintiffs on the one part and *Philip Shears* on the other. That recites, "Whereas *Phillip Cheppard* has allowed *Edward Bowen* to erect a dwelling house and barn on a piece of land belonging to him, and whereas the said *Edward Bowen* and *Mary Ann*, his wife, are anxious that the said premises should be conveyed to the same *Philip Cheppard* in trust for the benefit of *Eliza Jane Bowen*, they, the said *Edward Bowen* and *Mary Ann*, his wife, for divers good causes, etc., and in further consideration of the sum of ten shillings, etc., granted, bargained, etc., to the said *Philip Cheppard*, his heirs and assigns, all the estate, right, title and interest whatever of the said *Edward Bowen* and *Mary Ann Bowen*, both at law and in Equity, of in, to or upon the said premises, to have and to hold to the said *Philip Cheppard*, his heirs, etc, but to, for and upon the uses and trusts to be specified and declared in and by a certain indenture of even date therewith and thereto annexed." The deed also assigns to *Philip Cheppard* certain personal property to and upon the same uses and trusts as are mentioned in the conveyance already referred to. That conveyance commences with stating



"that the right, title and interest of the said *Mary Ann Bowen* in the house and barn erected on the land belonging to the said *Philip Cheppard* shall be preserved for *Eliza Jane Bowen*, daughter of *Edward* and *Mary Ann*, exempt from any liability for the debts, etc., of the said *Edward Bowen*." Then follows a covenant between the present plaintiffs and *Philip Cheppard*, that he shall have full power and authority to call for and receive the rents and profits of the said house and barn, and then a further covenant on the part of *Philip Cheppard* acknowledging, testifying and declaring that the uses and trusts upon which the first conveyance was executed were and are that the said house and barn and all rents and profits arising therefrom, shall be paid to the said *Mary Ann Bowen* during her life time and independent of her said husband, and after her death be applied towards the maintenance and support of the said *Eliza Jane Bowen*, etc. Whatever claims or title plaintiffs had under the gift of *Cheppard* to *Mary Ann Bowen* in 1831, they are estopped from setting it up by their deed to him *October*, 1838. But from that time to the trespass complained of, they have been in the undisputed possession of the property enclosed by a stone and wood fence, and recognized by *Cheppard* at a survey of his land by *Campbell* who, when they came to the five-acre lot did not include it in the survey, *Cheppard* telling the surveyor that was the lot he had given to *Mary Ann Bowen*. When *Cheppard* died it does not appear, and under the devise in his will to the defendant, there was no attempt on his part to dispute the possession of the plaintiffs until *April*, 1870. The deed of 1838 to *Cheppard* from the plaintiffs made them tenants at will, and at the expiration of one year from that date the possession became adverse. The *Acts* of 1866, chapter —, section 1, enacts that no land or rent to be recovered but within twenty years after the right of action accrued to the claimant or some person whose estate he claims. Section 3, "in the case of a tenant at will the right shall be deemed to have accrued at the end of one year from its commencement."

The right in this case under the statute for *Cheppard* to secure the land commenced in *October*, 1839, and in *October*, 1839 he would be excluded from recovering or maintaining the action, and the defendant, who claims through him cannot

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be in a better position, the plaintiffs holding adversely against his testator and defendant over thirty-one years. The Act of 3 & 4 Will. IV., chap. 27, the provisions of which are similar to the *Provincial Act* of 1866, by sections 2 and 3, has done away with the doctrine of non-adverse possession, and the question now is whether twenty years have elapsed since right accrued, whatever the nature of the possession, (except the cases mentioned in section 15 of the Act, which do not apply to the case under consideration,) and the effect of the Act is not merely to bar the remedy but to bind and transfer the estate. *Scott v. Nixon*, 3 Dru. & War., 388; *Nepean v. Doe*, 2 M. & W., 894; *Culley v. Doe*, 11 Ad. & El. 1008.

The possession in this case is ample to maintain the action against the defendant, who is a wrong-doer. I therefore think the verdict for the plaintiffs taken by consent for \$4 should remain, and that the plaintiffs should have the costs of the argument.



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## IRVINE v. THE NOVA SCOTIA MARINE INSURANCE COMPANY.

Action on a voyage policy. Plea—unseaworthiness. The vessel sailed from Halifax on the 6th October; on the 7th was found to be leaking, but was readily freed of water: on the 8th was repaired at a marine slip and pronounced thoroughly sea-worthy. Proceeded on the voyage next day, but recommenced leaking; was again repaired and resumed the voyage on the 13th. Arrived at the fishing grounds on the 19th, after passing through a severe gale in which she strained heavily. Was occupied in fishing until the 18th of the following month, when the vessel settled down so rapidly that they were compelled to beach her, and she was sold, bringing a very small sum.

Held, McCULLY, J., *dissentiente*, that the evidence of the gale not being well substantiated, and under the other features of the case the verdict for plaintiff should be set aside and a new trial ordered.

Conditions imposed in granting new trial as to costs of the first trial and of the argument.

SIR WILLIAM YOUNG, C. J., now, (January 15th, 1872,) delivered the judgment of the Court:—

This is an action on a policy of insurance in the sum of \$1750, on the schooner *Frank Irvine*, valued at \$4000; and there having been a total loss by leaking, and the vessel being run ashore, the substantial defence, as appears by the defendants' letter of the 7th January, 1860, is the alleged

unseaworthiness of the ship at the commencement of the risk. The law upon this subject may be considered as well settled. So far back as *Marshall's Treatise on Insurance*, vol. 1, p. 156, it is laid down that as the insurer is only liable for losses arising from the extraordinary and unforeseen perils of the voyage, if the ship become unnavigable or incapable of proceeding on the voyage insured, all the writers agree that the presumption shall be that this proceeded from the age and orttenness, or other defects of the ship, unless it be made of appear to have been occasioned by sea damage or some unforeseen accident. This presumption appears from the two cases cited at the argament, from the House of Lords, 1 *Dow*, 336, *Watson v. Clark*, and 3 *Dow*, 23, *Parker v. Potts*. In a late case in *New York* it was applied under very peculiar circumstances. The vessel sailed from *Rio* in the morning, and leaked so much, later in the day, that she was obliged to put back. But it could not be said that she had not met with any peril as is the case here. The captain testified that the ship behaved well when she sailed; that afterwards the wind arose with a heavy sea, causing the ship "to labor heavily and to jump into the sea." The jury found a special verdict that she was seaworthy when she sailed from *Rio*. But the Court set this verdict aside, on the ground of the inadequacy of the perils encountered to produce this damage to a seaworthy ship. 1 *Parsons on Insurance*, 380.

The presumption, also, while it may be rebutted by proof of seaworthiness, will not be confuted by the apparent strength of the ship, nor by her age, nor by the completeness of her equipments, nor the good faith of her owner. It has usually been held that the seaworthiness of the ship shall be presumed, and it is so stated in 1 *Phillips on Insurance*, 2nd ed., 324, though it is said in 1 *Parsons on Insurance*, 379, to have been held otherwise. Now, however, he adds, the law is different in many of the States, and so we have accounted it in this Court (see 3 *Dow*, 31). If the vessel, shortly after sailing, be found, by springing a leak, or otherwise, to be unseaworthy, it is the duty of the master to make a port where repairs and supplies can be obtained, and when obtained; the liability of the underwriter, previously lost or

suspended, would revive. That, I think, is the fair inference to be drawn from *Weir v. Aberdeen*, 2 B. & Ald., 320; *Paddock v. Franklin Ins. Co.*, 11 Pick., 227; *Hazard v. N. E. Mar. Ins. Co.*, 1 Sumner, 218, 230, and other cases in the books.

On the trial of this cause, after a charge from Mr. Justice *Dodd* leaning pretty strongly for the defendants, and of which no complaint was made at the argument, the jury found a verdict for the plaintiff; and we must look narrowly into the circumstances in proof, and into the conduct of the trial, to ascertain whether it ought to be upheld. One peculiarity of the trial was the production of the protest and of an affidavit supplementary thereto, as part of the preliminary proof, which were read on behalf of the plaintiff without objection, the other evidence for him being his own with two depositions. The only evidence on the defence was that of *George McKenzie*, who had no personal knowledge of the case, and testified only as an expert. Neither *Wilson* the master, nor *Devine* the mate, nor *Fraser* one of the seamen, who combined with them in the protest and affidavit, nor any of the seamen on board were produced at the trial. The only evidence from the seamen was the deposition of *Hemeon*. The statements in the protest, therefore, became of great moment, especially if they operate against and cast suspicion on the claim. In using this word I must not be understood as casting any imputation on the owner, whose only imprudence, I think, was proceeding to trial on inconsistent and doubtful testimony. It appears by the protest that the schooner sailed from *Halifax* on a fishing voyage on the 6th October, 1868; that being abreast of *Cape Canso* on the 7th at 7 p. m., the wind blowing fresh at the time, when the pumps were tried as a usual thing, it was then discovered that the vessel had sprung a leak; the crew manned the pumps and freed her of water. On the 8th they arrived at *Port Hawkesbury*, and put the vessel on the marine railway, and there had her examined and caulked where deemed necessary by the workmen. On the 9th they proceeded on the voyage, and the vessel still leaked, when the master concluded that if the leak increased he would touch at the port of *Sydney*, and put the vessel on the marine railway there.

During all the time she could be freed by the pumps and was so. After leaving the Strait the leak increased to such an extent that the master deemed it prudent and advisable to run no risk in proceeding on, and put into *Little Canso*. After undergoing repairs there by putting in some new planks abreast the main chains, and further caulking, they again proceeded on the voyage on the 13th, and arrived at their destined port in the *Bay of Islands* on the 19th, without further trouble or accident, and commenced their fishing, and continued doing so without interruption until the 18th of *November* (that is after an interval of thirty days), when they had caught 300 barrels of herrings, and were hindered from further prosecuting their vocation by the vessel settling down during the night to such a degree that the water in the hold covered the cabin floor, and the pumps being unable to relieve her, the master was obliged to beach her, and she was afterwards condemned as unseaworthy and sold, producing \$49 net proceeds.

The affidavit made by the same parties at *Halifax* does not materially differ from the protest. It states that on the 7th *October*, there being a fresh gale blowing at the time, the master discovered that she was making water rapidly; that when she was put on the marine railway no leak could be detected; that on the 18th *November* the leak again made its appearance, and the water gained so fast on the pumps that they were forced to beach her to prevent her sinking in deep water. The affidavit gives the names of the surveyors, who concurred in opinion but did not reduce the facts to writing, there being no magistrate or notary on the spot. It states the proceeds at \$168, differing from the account rendered to the defendants. The facts thus detailed, and the extraordinary circumstance of a vessel thus going down, as will presently appear, while at anchor, justified the underwriters, I think, in resisting the claim till it should be fully investigated.

Let us now look at the two depositions. That of *Embrée*, the head carpenter at the railway slip, is much in the plaintiff's favor. He found the corners of two or three of the butts leaking from the working out of the oakum; found a rotten knot or knot-hole; caulked the butts and stopped the knot-hole; made all the examinations and all the repairs he con-

sidered necessary to make her sea-worthy ; considered her a fine good vessel,—a good sea-worthy first-class vessel at that time. On his cross-examination he said that he did not try her planking above the ballast water-line,—found the planking sound below that line ; she had a thick coat of copper paint on ; found no worms, and could not account for her going down at anchor. He might have added that her leaking immediately on her leaving the slip was equally unaccountable.

*Hemeon's* deposition goes much into detail, and contains a very material statement not to be found in the protest or affidavit of the master and mate, which probably had great influence with the jury. He states that in the month of *October*, when near the *Bay of Islands*, there was a heavy gale of wind which lasted from Saturday night till Monday morning. The vessel strained heavily in that gale. It was after that she sprang the leak and leaked worse than she did before ; he had no doubt that the leak was caused by the straining in that gale ; the men had to labour more in pumping after that gale.

Now, with the absolute silence of the officers of the ship as to this gale, which renders it very problematical, and with two other *Hemeons* three *Crowels*, and a *McKay* on board, several of whom could easily be produced, I think that the evidence of the single seaman examined should be confirmed, and that the defendants are entitled to have a new trial if they esteem it for their interest, on the terms which appear to me to be equitable. If the plaintiff succeeds in a second trial he is to have the costs of the first, and the costs of this argument are to abide the event. If the defendants are unwilling to accept a new trial on these conditions, the rule *nisi* will be discharged with costs.

**MCCULLY, J., dissentiente.**—This was an action upon a policy of insurance for a total loss. The policy is in the usual form but contains in addition what is known as the "rotten clause." The declaration, after setting out the policy or rather the material clause, contains the usual averment of all conditions fulfilled, &c. The pleas were, *first*, not lost by perils insured against ; *second*, unseaworthiness ; *third*, no interest in plaintiff ; *fourth*, no proof of loss ; *fifth*, never indebted, &c.

The cause came on for trial before Mr. Justice *Dodd*, at *Halifax*, *January*, 1870, and resulted in a verdict for the plaintiff for the amount claimed. The defendants obtained a rule *nisi* to set the same aside, and, upon the argument, the principal ground relied upon was "unseaworthiness." The schooner insured was called the *Frank Irvine*, and was insured with defendants by *W. & C. Silver*, as agents of plaintiff. She was wrecked at a place called the *Bay of Islands*, on the 18th *November*, 1870, on the coast of *Newfoundland*, a remote fishing station, accessible only or mainly by navigation and in high northern latitudes. She was valued at \$4000: insured for less than one-half, say \$1750. The salvage amounted to \$24.50. But the policy having been extended, the original risk running to 30th *November*, 1869, within which time the schooner was lost, and the extension not having been entered upon, the plaintiff claims the.....\$1750 00  
Less salvage..... 24 50

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\$1725 50

and a further sum of ..... 87 50  
for return premium for the extended risk not entered  
on, in all.....\$1813 00

The verdict was for \$1813.00. The notice of the loss to defendants was given on the 29th *December*. Whether this was the earliest opportunity plaintiff could have availed himself of to notify defendant of the loss, does not appear; but as no objection was taken at the trial, nor any point made as to want of notice or abandonment, but merely that there was no preliminary proof given to justify action, and no proof of loss, I am of opinion that the only questions for the Court now to pass upon, are those of preliminary proof, loss, and unseaworthiness.

First then as to unseaworthiness, what it is that will relieve the underwriters. There is a difference in cases of voyage and time policies as to seaworthiness, and this was a time policy. As to time policies and how far and in what respects they differ from voyage policies, see *Michael v. Tredwin*, 17 C. B., 251; *Jenkins v. Haycock*, 8 Moo. P. C., 351; *Tompson v. Hopper*, El. Bl. & El., 1038. There, *per Willes*, J., "A time policy contains no implied warranty of seaworthi-

ness, either at the commencement of the risk or at any other time." This is a most important distinction running through the whole of this case. In *Gibson v. Small*, 4 H. L. C., 353; *Jenkins v. Haycock*, 8 Moo. P. C., 351, it was held that in ordinary cases there is not any implied warranty of seaworthiness when the policy is a mere time policy and not a policy connected with a voyage. And these, it will be observed, are cases of the very highest authority and very recent. In *Roscoe's Digest of Evidence*, 12th and latest edition, page 390, the writer remarks that the doubt suggested by the Common Pleas in *Michael v. Tredwin*, 17 C. B., 251, whether there might not be an implied warranty of seaworthiness in a time policy essentially connected with the commencement of a voyage was decided in the negative in *Thompson v. Hopper*, 6 Ell. & Bl., 172; *Fawcus v. Sarsfield*, 6 E. & B., 192. Nevertheless, if the ship be actually unseaworthy, and it is clearly shown that the immediate cause of the loss arises from that fact, it is not to be doubted but that the underwriters are relieved. But in *Knill v. Hooper*, 2 Hurl. & Nor, 277, it was held and it is clear law that seaworthiness is a comparative term, and it is for the jury to say whether the ship was reasonably able to perform the voyage. If that be so,—and who can doubt it,—here the jury have pronounced, and surely not without ample evidence, if the witnesses are trustworthy, that the vessel when she sailed was seaworthy. They heard the owner—the plaintiff—testify to that fact, the witness *Hemeon* and the carpenter *Embree*; they heard defendants' expert, too, (of whom I have something more to add); they saw their manner of giving testimony; and although this vessel did begin to leak considerably when she had got well down towards *Cunso*, does it follow that she was unseaworthy and that she continued to be unseaworthy until after the gale which, if *Hemeon* is to be believed, did the mischief? And who other than the jury are to settle that point?

But let us turn to the minutes and see what they disclose. At line 21 plaintiff, the owner, says: "The vessel was built under my own eye in *Shelburne* and launched *July*, 1866." She was therefore comparatively a new vessel—but, about three years old—if built as witness goes on to describe, it is impossible that her materials could be decayed or rotten. \* \*



He adds, "she was a substantial, good vessel." She had just arrived at *Halifax* from *Shelburne*, when she was insured. When in *Shelburne* she was not pumped for the last three weeks. Made a little water between *Shelburne* and *Halifax*. Not more than usual with good vessels. I considered her a tight and seaworthy vessel and well found for the voyage. The preliminary proof, a protest dated 28th *December*, 1869, and a second affidavit to same effect 30th *December*, 1869, were affixed and received as such. They do not appear to have been read then nor during the trial. I have carefully examined the Judge's notes for the purpose of ascertaining this fact, and the rather, because on the argument the counsel for defendants used this preliminary proof, and its contents, to contrast it with alleged discrepancies as was contended, in regard to the testimony of plaintiff's witnesses, and we are bound by the Judge's notes as to what takes place on trials. The learned Judge, in his charge, did refer to the contents of the protest, it is true; but the contents of a protest are not evidence, and if they were given to a jury as testimony against the wishes of the opposing party, it would be good grounds for a rule to set aside a verdict obtained by such means. In *Christian v. Coombe*, 2 Esp., 439, it is laid down by Lord *Kenyon*, "that a protest is of itself evidence, only to contradict the captain's evidence and not to show a variance between it and the condemnation." Here the captain was not examined, and although the defendants have had the benefits of the comments of the learned Judge in remarking upon the contents of the papers *as if they were evidence* and had been read to the jury as such, yet a protest not being evidence, the contents cannot now avail to disturb a verdict found over the whole case. *Arnold*, in his treatise on *Insurance*, vol. 2, page 1353, says: "The protest of a captain, so long as he is living, is in no case evidence on the one side or the other, the only use that can be made of it is to contradict his testimony if he vary from it."

Then comes *Peter Hemeon*, whose testimony was taken under the statute and read, and he was the principal witness for plaintiff. I do not think it necessary to transcribe more than the important portions of it or further than to show that in his direct examination and it is not varied in his cross-examina-

tion he uses this language: "After they had been fishing one or two weeks at *Bay of Islands* the vessel sprung a leak; the vessel sprung a leak in the night while within a mile of the shore; she had to be run ashore *to save the lives of the crew.*" Full particulars are then narrated as to the state of the vessel when the catastrophe occurred,—the proceedings adopted,—the survey, sale, &c. Then he adds: "The vessel I consider *was in a seaworthy condition when we left Halifax*; she did not leak then; she first began to leak after leaving *Halifax, when pretty well down towards Canso.*" (*Canso* is about 150 miles from *Halifax*. These are his very words.) "Less than one hour in twenty-four pumping kept her free. She was put on the slip, surveyed there, and repaired by *Mr. Embree*, and proceeded, but still leaked, much as before." This has the appearance of truth and honesty. Witness then testifies to "a heavy gale of wind near the *Bay of Islands* in *October*, lasting from Saturday night till Monday morning." He says: "The vessel strained heavily in that gale. It was after that," he says, "she sprung a leak, leaking worse," (he explains,) "than she did before, and," he says, "he has no doubt," (so he swears,) "that the leak was caused by the straining in that gale." These are his own words and uncontradicted. "More pumping was required," (he adds,) "after than before." The cross-examination elicited little of importance explanatory. The name of the captain as well as the names of the crew are given, none of whom excepting *Hemeon* were examined by either party. In his cross-examination he says, "after leaving *Canso*, the vessel leaking still, they called at *Little Canso*, and repaired to stop a knot hole." The plaintiff, in his cross-examination, says, that "*Wilson*, the master, went to the *United States* and had returned, and had again gone to the *United States.*" His testimony was not taken by plaintiff nor by defendant. Most of the remaining portion of the crew seem to be residents of *Yarmouth*.

*David Embree's* examination, taken under the statute, was read. He was a ship's carpenter at *Port Hawkesbury*, and gives a circumstantial account of the state of the vessel while on his slip for repairs, and what was done, and pronounced her a *fine, good vessel—a good, seaworthy, first-class vessel at*

*that time*, when repaired and off the slip, although he did not try her planking above ballast water-line.

This was the plaintiff's case, and a pretty strong case it is, I think I might say overwhelmingly strong, in the absence of any evidence on the part of defendant.

Opposed was the testimony of *George McKenzie*. But *McKenzie* rather strengthens plaintiff's case instead of weakening it, in my view. Mark what he, (defendants' expert,) says on cross-examination: "Pumping half an hour in twenty-four I would not consider unseaworthy. If afterwards she," (the vessel,) "was in a gale and the leak increased, I would attribute it to a strain. A vessel going down after seven weeks from *Halifax*, I would not conclude that she was unseaworthy when she left. Taking *Hemeon's* testimony, I would not conclude that she was not seaworthy when she left *Halifax*." Now *Hemeon* was contradicted by no person, and why is he not to be believed? Because, it was contended, the protest does not mention the gale, and the negative, if the protest were evidence, which it clearly is not, is thus to overthrow the positive. But *Hemeon*, fortunately for himself as to the vessel's seaworthiness, is corroborated by the plaintiff *Irvine* and *Embree* too, as we shall presently see, all three testifying clearly, distinctly and positively, the two former that the vessel in question was seaworthy when she sailed from *Halifax*, and the latter when she sailed from *Canso*, added to which defendants' witness, as already remarked, with no small corroboration if he is a competent witness, states, that "a vessel going down after seven weeks from *Halifax* I would not conclude she was unseaworthy when she left." And upon this mass of testimony in favor of plaintiff's case, with not a single particle of testimony opposed, (the presumption of law to which I shall refer specially excepted,) a jury having given faith to it and found accordingly, it is contended by defendants' counsel, that they exceeded or mistook their duty and their functions, in finding as they did, and their verdict should, therefore, be set aside. For what grounds? Because, forsooth, there is a presumption, to use the witness's language, that inasmuch as that when pretty well down towards *Canso* after leaving *Halifax* this vessel first began to leak, but even then only so much that "less than one hour's

pumping in twenty-four kept her free," this vessel must have been unseaworthy.

Plaintiff's counsel, I should remark, objected to *McKenzie's* examination as an expert, and, I think, very properly. No grounds were laid to justify his examination in such a case. See *Peake's Nisi Prius Cases*, page 25. He neither appears to be a ship-master or a ship-carpenter, and yet, having heard, he says, a "portion" of the case to-day, and having read the first protest, he was allowed to testify, and testified and gave his opinion as to the seaworthiness and condition of the vessel (not adversely, as I think, to plaintiff's right to recover,) and as to the cause of the accident which is opposed to the doctrine in *Fenwick v. Bell*, 1 Car. & Kir., 312; 1 Camp., 117. "Experts," says *Taylor*, sec. 1678, "usually come with a bias on their minds to support the cause in which they are embarked, and little weight will, in general, be attached to their evidence." Citing 10 Cl. & Fin. and 5 B. & Ad., 330, where a new trial was granted for improper admission of such testimony. However, the defendants got the benefit of his opinion, after having read the protest, which was not of itself evidence of anything, but for the purpose of preliminary proof in this case, as appears by the case of *Senal v. Porter*, 7 T. R., 158.

The contention on the part of defendants, as remarked, is that as the law raises a presumption that, if after a ship's departure on a voyage, she exhibits signs the reverse of seaworthiness, without apparent or sufficient cause, that in such case the vessel was unseaworthy from causes existing before or at the time of departure. I concede this as a general principle in voyage policies to be sound law, and the defendants have had the benefit of it, for it was put to the jury by the learned Judge, with *McKenzie's* evidence based upon the protest and its contents, and yet, looking at the strong evidence of plaintiff, that the vessel was almost new, of *Peter Hemeon*, and of *David Embree*, all concurring as to the seaworthiness of the vessel, there being no contradictory or conflicting testimony—nothing but the presumption raised by law as above, the jury, whose peculiar province it was to weigh this presumption, as against this mass of testimony offered by plaintiff, have settled the point, and found for plaintiff. Ought the Court

now to review that finding, and set it aside? The defendants think so, and cite cases, 4 *John*, 132; 11 *Pick.*, 227; 2 *Par.*, 555; 2 *John*, 124; 3 *Bing.*, N. C., 892; 3 *Dowl.*, H. L. C., 33; 1 *Dowl.*, 336; 2 *Par.*, 139; 3 *Brod. & Bing.*, 158.

I am, however, of a different opinion. The circumstance of the absence of testimony on the part of the captain and crew, was dwelt upon by the defendant's counsel; but whose duty was it, under such circumstances and such an issue, whose duty was it to procure and tender it? The affirmative was upon the defendants. *They alleged unseaworthiness.* 1st *Arn.*, 190, says: "If the loss takes place long after sailing," (the *Frank Irvine* sailed from *Halifax* 6th of *October* and was lost the 18th of *November*—43 days after and after the gale, &c., &c.) "then if the underwriters mean to rely on the defence that the ship was unseaworthy when she sailed, the *onus probandi* is upon them, and they will have to make out the fact by satisfactory evidence," and, at page 1361, vol. 2, he adds: "As the fact of unseaworthiness is a condition precedent, which applies only to voyage policies, as already shown, to the attaching of the policy it should seem that it lies on the assured to give some proof of it in the first instance." Citing *Strong, J.*, in *Tidmarsh v. Was. F. & M. Ins. Co.*, 4 *Mason*, 441; yet adding: "But adding: "But the Supreme Court of *Massachusetts* held the ship is to be considered seaworthy till the contrary appears, and that the burden of proving unseaworthiness is on the underwriters." "But," adds *Arnold*, "there can be no doubt that very general and slender evidence of seaworthiness at the commencement of the risk would be sufficient to make out a *prima facie* case and throw on the underwriter the proof of unseaworthiness."

"The seaworthiness of a ship," says *Taylor on Evidence*, page 51, citing 3 *Car. & Payne*, 16, *per Lord Tenterden*, "is a question for the jury." And so being a question for the jury, I may be permitted here to cite the language of Lord *Hardwicke*, in *R. v. Poole*, *Cas. Temp.*, *Hardwicke*, p. 28, quoted with so much approbation in *Browne Leg. Mar.*, p. 86: "It is of the greatest consequence to the law of *England* and to the subject that these powers of the Judge and jury be kept distinct—that the Judge determine the law and the jury

the fact—and if ever they come to be confounded it will prove the confusion and destruction of the law of *England*."

The defendants' case was put to the jury most favorably for them, I think. They have weighed the testimony and the legal presumption,—their privilege and duty being to do so, under the Judge's charge and according to law, and their decision should, I think, be final as to their findings.

In *Jardine v. Leathley*, 3 Fos. & Fin., 80, per *Mellor, J.*, "It is a question for the jury whether the leak arise from the ship being *unseaworthy* before the voyage, either from an injury arising before the insurance, or from ordinary wear and tear, or whether it arose from the perils of the sea in the course of the voyage insured, &c."

If we are to be guided by the Judge's notes, the preliminary proof offered, (which was, I think, sufficient for that purpose,) as I have already remarked, *was not read to the jury*. If it was read it was clearly and confessedly irregular. It ought not to have been read. If the Judge commented upon it, contrasting it unfavorably with the plaintiff's testimony, still it was the prerogative of the jury beyond all doubt, to decide how far, even if legal proof, it weakened the plaintiff's case, and they have done so. It may be, as has been remarked by eminent Judges, that the Court, if the question of fact were with them, or had they been jurymen, would have found differently. But I am not prepared, for one, in a case like the present, to review the finding of a jury on a question by common consent, and all legal authority, so far as I know, concurring, one pre-eminently for the jury. I am not prepared to overrule their finding, nor even to enter upon the task of deciding as to the weight of evidence. It is enough for me that the law of presumption in such a case was rightly expounded to them by the learned Judge who tried the cause, and that there was evidence of seaworthiness, I think strong evidence, and the jury have given credence to the plaintiff's witnesses. It would be entering upon a broad sea of difficulty and uncertainty to order a new trial in a case like the present. There is no pretence of fraud, no insinuation of concealment or unfair dealing. I think the rule *nisi* should be discharged.

But before I conclude I am prompted to remark that the principle which is involved when the Court reviews the facts upon which a jury have passed, and overturns their finding, ordering a new trial, is one of such moment in my mind that I have given to this case much more than ordinary care and deliberation, and have expanded this judgment in consequence. This is the first time, since I have had the honor of a seat on this Bench, that I have been called upon to set aside the finding of a jury when the controversy is as to facts, the weight of evidence, or the credibility of witnesses, and in arriving at the conclusion announced, I have, so far as I have been able to understand the subject, laid down the law as I remember it to have been uniformly delivered by this Bench while I was at the bar, and by eminent Judges who have passed away or who no longer preside. To come to any other conclusion than that this verdict must stand, it appeared, and still appears to me, is to overrule a number of cases decided by this Court and which, for a good while have been held to be conclusive; I refer especially to the cases of *Peters v. Silver*, N. S. Decisions, p. 75, and *Roop v. McDonald*, Trinity Term, 1863. How these cases are to be considered, if the present verdict is disturbed, or how the two classes could be reconciled, or which would thereafter be the guide, I think would be found very embarrassing. But I have not based my judgment upon Provincial decisions merely. I refer to the old case of *Swain v. Hall*, 3 Wills, 45, cited in all the modern books of practice as the leading case where a new trial was refused, though the C. J. reported that the strength of evidence was against the verdict. The same result followed in 1 Wills, 22. *Lacy v. Facey*, 3 Dow., P. C., 668, is in point, and so is *Cann v. Forrester*, 5 Nev. & Man., 405, and there is a long list of other cases to the same effect. In the recent case of *Flinn v. McFarlane*, having been in the cause I did not hear the argument, and, of course, gave no judgment.

In conclusion, I may say that I have only to regret that I have found myself compelled, for the reasons given, to dissent from the other members of the Court on a question of so much importance, and on a point so provocative of controversy. I think it safer, however, in such cases "*stare super antiquas vias.*"

## JENNETT v. PETITMAITRE.

DEFENDANT'S property was attached by Gordon & Keith under the Absconding Debtor's Act, and subsequently by plaintiff under the Dominion Act. G. & K. applied to have plaintiff's attachment set aside on certain technical grounds. At the argument of the rule *nisi* it was discovered that it had been granted by a Judge at Chambers and was returnable at Chambers, and had been brought on for argument before the Court by agreement between the attorneys.

*Held*, that the application should be refused, the cause not being properly before the Court, and the applicants having no *locus standi* therein.

McCULLY, J., now, (January 15th, 1872,) delivered the judgment of the Court:—

This cause was entered on the docket for argument in the usual way, but before the argument closed, on examining the rule *nisi*, it was discovered that it had been granted by a Judge at Chambers returnable at Chambers. By agreement between the attorney of the plaintiff in this suit and the attorney of the plaintiff in another suit, *Gordon et al. v. Petitmaitre*, with a view of settling a question of priority of lien, or rather to settle a conflict of jurisdiction as between the Dominion and the Provincial statutes, this and another cause had been entered upon the argument list.

From the affidavit filed and read, it appears that on the 12th April, 1870, *Gordon & Keith*, of this city, issued process in the usual way against defendant as an absent absconding debtor, and placed their writ in Sheriff Sawyer's hands, who attached defendant's property and advertized the same for sale. That subsequently, viz., on the 29th April, 1870, the plaintiff attached, or issued an attachment, under the *Dominion Insolvent Act*, and placed his writ in Sheriff Sawyer's hands, who returned it executed by attaching property of defendant, but subject to the previous attachment of *Gordon & Keith, &c., &c.* *Gordon & Keith* by their attorney, and upon affidavits made in their cause, applied, and obtained a rule *nisi* to set aside the proceedings in this case for irregularity, on the ground that the order for the attachment herein was issued by a Judge of the Supreme Court, and not by the Judge of Probate for *Halifax* county. But I am not prepared to admit that Messrs. *Gordon & Keith*, have any right to intervene in this summary way to set aside proceedings in a cause where they are neither plaintiffs nor defendants, and



which is itself not in this Court. In what respect does the case differ from that where two plaintiffs are by different processes out of different Courts proceeding against the same defendant, and a strife ensues to obtain the first judgment? But what authority can be found to justify one of these plaintiffs to entitle affidavits not in his own cause, but that of his rival, pending in another Court, and intervene thus, and move to set aside his proceedings for some supposed or actual irregularity. What *locus standi* has he in the cause of his rival creditor, or what jurisdiction has the Court in the matter. No cases were cited to justify this proceeding, and I can find none. By section 8 of chapter 141, *Revised Statutes*, a subsequent attacher may in a cause in the Court dispute the validity of the previous attachment on the ground that the sum was not due, or not payable, when the action was commenced. But that is not this case, nor is it analagous. Here *Gordon & Keith* are themselves the prior attachers. And but for the statute, probably such a course would not be permitted even in the Supreme Court.

A question may perhaps arise, eventually, as to which of the rival creditors is entitled to the proceeds of the sale of the goods attached, first by *Gordon & Keith* under the *Absconding Debtors' Act*, and subsequently by *Jennett* under the *Dominion Act*, but we think that question is not legitimately before the Court. Possibly the sheriff may have occasion to seek indemnity from one or other of the parties, or by interpleader or otherwise seek protection, but when that course is resorted to, and this Court is called upon to deal with such a question, it will be time enough to entertain it.

On every ground, first as not being an order directed to be disposed of here by the Judge who granted it at Chambers; because *Jennett v. Petitmaitre* is not a cause in this Court, and because the party who sued it out has no *locus standi* in this cause, we think the order *nisi* should be discharged with costs.

## FIELDING v. ACKERLY.

Ows Hazel on the 19th August, 1869, executed a deed to plaintiff of a certain lot of land, and on the 24th another deed of a second lot, both of which deeds plaintiff had recorded on the 25th. On the 3rd May previous Hazel had given a deed of the same two lots to defendant which, however, was not recorded by him until after plaintiff's deeds. Plaintiff had notice of this deed when he received his second deed but not when he received the first. The jury found that the deeds to plaintiff were *bona fide* and for good consideration, whereas the deed to defendant was made for the purpose of defrauding Hazel's creditors.

*Held*, that under these findings plaintiff must succeed, his knowledge of the existence of defendant's deed at the time he received his second deed having no effect upon his title, as that deed was fraudulent.

DODD, J., now, (January 15th, 1872,) delivered the judgment of the Court:—

In this case the plaintiff and defendant claim title under the same person, *Ozias Hazel*,—the plaintiff under the respective deeds of the 19th *August*, 1869, and the 24th *August*, 1869, recorded 25th *August*, in the same year; the defendant under deed of 3rd *May*, 1869, not recorded until after registry of plaintiff's deeds. The plaintiff's deeds cover two pieces of land; the defendant's deed includes both. On their face the deeds are for a valuable consideration. The cause was tried under certain issues prepared by the learned Judge in Equity, modified and somewhat altered by the Judge who tried the cause. It was admitted at the argument that the cause was tried upon the equitable plea upon which the issues were prepared. The only defence to the action, if any, is an equitable one, as set out in defendant's plea. That alleges that the plaintiff, knowing that the defendant had an unrecorded deed for valuable consideration and intending fraudulently to deceive and defraud said defendant, obtained and received from *Ozias Hazel* a deed to himself of the said lands, and the said defendant avers that the said deed to the plaintiff was and is fraudulent and void. To this plea the plaintiff replies that the deed from the said *Ozias Hazel* to the defendant was fraudulent and void, and made secretly and without consideration, and under an arrangement then unknown to plaintiff entered into between the said *Hazel* and defendant, whereby defendant agreed to take said deed and hold the same secretly, and not record the same; and the plaintiff being unaware of said fraudulent agreement, bargained with the said *Hazel* for the purchase of

the said lands, and *bona fide*, and for a valuable and sufficient consideration purchased the same, and obtained deeds thereof, which were immediately recorded. Our *Registry Act*, chap. 113, *Revised Statutes*, section 19, enacts that deeds or mortgages of lands only executed, but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration, who shall first register the deed or mortgage of such lands. The deed under which the plaintiff claims title, although subsequent in date to that of the defendant, was registered some days before defendant's deed. The counsel for defendant at the argument contended that a party could not take advantage of his own fraud, and as a general principle he is correct, but the principle must be confined to the parties or privies to the fraud, and the case cited by the counsel, *Roberts v. Roberts*, 2 B. & Ald., 367, proves that to be the case. There it was held that no man can be allowed to allege his own fraud to avoid his own deed. Therefore when a deed of conveyance of an estate from one brother to another was executed to give the latter a colorable qualification to kill game, it was held as against the parties to the deed valid and sufficient to support ejectment for the premises. *Holroyd, J.*, said, "a deed may be avoided on the ground of fraud, but then the objection must come from a person neither party nor privy to it, for no man can allege his own fraud to invalidate his own deed." Where there were two assignments of the same lease of premises within the county of *Middlesex*, and that executed last was registered first, *Held*, that the deed last registered in a Court of Law be considered as fraudulent and void in consequence, 7 *Ann*, chap. 20, sec. 1, although the party claiming under the second assignment had a full knowledge, when it was executed, of the prior execution of the first assignment. The words of the statute are, that such deeds or conveyances shall be judged fraudulent and void against any subsequent purchaser for valuable consideration. It is to be observed that the words *bona fide* purchaser, are not used. I think, therefore, in a Court of Law we are bound to give effect to these words; *Abbott, C. J.*, *Doe d. Robinson v. Allsop*, 5 B. & Ald., 142. In *Doe v. Rutledge*, *Cowper's Reps.*, 712, in referring to the statute of *Ann*, Lord *Mansfield* said, "although in that statute it is positively said that a reg-

istered deed shall take the place of an unregistered deed, from which it might be argued that if a person knew of an unregistered deed, it should not stand against him; Equity says that if the party knew of the unregistered deed his registered deed shall not set it aside, because he has that notice which the Act of Parliament intended he should have. The Lord Chancellor in giving judgment in this case, in reference to the statute of *Ann* said, when a person had no notice of a prior conveyance there the registry of his subsequent conveyance shall prevail against the prior, but if he had notice of a conveyance then that was not a secret conveyance by which he could be prejudiced. The enacting clause says that every such deed shall be void against every subsequent purchaser or mortgagee, unless the memorial thereof be registered, that is it gives the legal estate, but it does not say that such subsequent purchaser is not left open to an equity which a prior purchaser or incumbrancer may have, for he can be in no danger when he knows of another incumbrance, because he then might have stopped his hand. See also upon the same subject *Chevil v. Nichols*, 1 Strange, 664, and *Worsley & Assignees v. Demaltos & Slade*, Burrows, 474. This case depends upon the construction of sec. 19, chap. 113, that I have already referred to. The deed to plaintiff of one of the lots in question of the 19th *August*, the jury have found was given for a valuable consideration, and registered prior to the deed to defendant of the 3rd *May*, and without knowledge of the plaintiff at the time of the prior deed to defendant, bringing the case within the language of the Provincial Act, and making the first deed void. The deed of the 24th *August* to plaintiff, although the jury have found it was given for valuable consideration, they have also found that at the time he received the deed he was aware that the defendant then held a prior deed of the same lands unregistered. This brings it within the cases I have referred to, and if the deed to defendant had been *bona fide* and for a valuable consideration, the verdict should have been for him for the land included in the plaintiff's deed of the 24th *August*, but the jury have found that the deed to defendant was given without consideration, and made fraudulently for the purpose of defrauding the creditors of

*Hazel*, and that by an agreement between the said *Hazel* and the defendant, the said deed was to be kept secret and held secretly, and not to be recorded, and that such secrecy was not at first known to the plaintiff. Under these circumstances the defendant can derive no benefit from the knowledge the plaintiff had of his prior deed when he, the plaintiff, received the deed of the 24th *August*, upon the principle that a party can derive no benefit from his own fraud in a contention with a party not privy to it. I am, therefore, of opinion that the verdict should be entered for the plaintiff for the lands claimed by him under the deed of the 19th and 24th *August*, and that the rule for a new trial should be discharged with costs.

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### PHELAN v. KELLY.

PLAINTIFF'S declaration alleged that defendant had fraudulently represented to B. B. & Co. that plaintiff was about to leave the Province, and that there was reason to fear that B. B. & Co. would lose a debt due them jointly by plaintiff and defendant unless the now plaintiff were arrested, whereupon B. B. & Co. caused plaintiff to be arrested, etc. The declaration contained no allegation that defendant had maliciously instigated B. B. & Co. to arrest plaintiff, or that they had no reasonable cause for so arresting him, or that defendant knew that there was no reasonable cause.

*Held*, that the declaration disclosed no cause of action.

WILKINS, J., now, (January 15th, 1872), delivered the judgment of the Court:—

This is one of those cases which suggest a difficulty at the first blush, but are found to be clearly resolvable on principle, when fully considered. The third count presents the plaintiff's alleged right of action in the strongest point of view shewn by him, and therefore that count alone need be examined. He therein says: "That the defendant fraudulently represented to *Black Brothers & Co.*, that the plaintiff was about to leave *Nova Scotia*, with intent to remain abroad, and that there was reason for *B. B. & Co.* to fear that they would lose the debt which plaintiff and defendant owed them, unless plaintiff should be forthwith arrested, whereas plaintiff was about to go away, for a few days only, as defendant then well knew, and was not about to leave the province with intent to remain abroad, and there was no reason, as defendant well knew, to

fear loss of their said claim, if the arrest was not made; and the defendants, by so representing, induced *B. B. & Co.*, to cause plaintiff to be arrested and held to bail for the said debt, and to be detained and imprisoned for a long time, whereby, &c."

In the view I take of this case it is unnecessary to notice the defendant's pleas, further than to observe, that they, substantially, while disclaiming all malicious motive, assert that the plaintiff's conduct induced a belief in the defendant's mind that he intended permanently to withdraw himself from the province, and that from real self-interest, under circumstances set out in the pleas, he was moved to induce, and did induce, *Black Brothers & Co.*, to take out process to arrest the plaintiff, for a debt actually due, jointly and equally by both plaintiff and defendant to the said firm. There are no replications on the issue roll, and therefore all material allegations in the pleas are simply statutorily traversed.

I am of opinion that the declaration discloses no cause of action. The action, though uncommon in the history of the past, is not absolutely novel. If it were so, that circumstance alone would constitute a strong *prima facie* argument against the asserted right. But a case was cited at the argument which has principles lying at its roots that are common to this and to that, and which must govern our decision of the former. In *Flight v. Leman*, 4, Q. B., 883, a declaration in case alleged that defendant unlawfully and maliciously did advise, procure, instigate, and stir up one *T.* to commence and prosecute an action on the case against the plaintiff, wherein certain issues were joined, as to which plaintiff was acquitted. It was held that no cause of action appeared, the declaration not alleging want of *reasonable and probable cause for the action*. Lord Denman, C. J., said: "The count ought to shew the ingredients which make the instigation to a suit actionable. The plaintiff has not done this, for beyond all doubt, the absence of reasonable or probable cause is one such ingredient, in the absence of which it does not appear that the *plaintiff has been unlawfully disturbed*." Patteson, J., said: "The case is analogous to that of a complaint of malicious persecution or arrest; and here, as there, the want of reasonable and probable cause ought to be alleged." Williams, J., said:

The averments in this declaration might be sustained by proof that the defendant being an attorney, had held a conversation with *T.*, and had said: "if your story is correct you might sue *Flight*." No action could be maintained on that, unless it further appeared that the now defendant knew that there was no right to sue the plaintiff." *Coleridge, J.*, added: "Without the averment of want of reasonable or probable cause, this declaration shews no right of action."

Not differing from the above in principle on the point of enquiry is *Fitz John v. Mackinder*, 9, C. B., N. S., 505. This, a very interesting case, was one in which the plaintiff brought an action against the defendant for maliciously and "without reasonable or probable cause," causing him to be prosecuted on an unfounded charge. It was held that the action was maintainable, the committal of the plaintiff and his prosecution for perjury, being the result of the wrongful and malicious act of the defendant. The declaration in this last case was perfect in the respect in which the count in the former was fatally defective. It alleged the want of "reasonable and probable cause." The declaration, moreover, in either of those two cases had in it a necessary ingredient which the declaration in the case before us has not, I mean, of course, the word "maliciously." In *Cotterel v. Texas*, 11, C. B., 730, these principles are fully recognized. It is scarcely necessary to notice *Grainger v. Hill*, 4 Bing., N. C., 212, though it was relied on by plaintiff at the argument. It was an action for abusing the process of the court in order illegally to compel a party to give up property. This new statement shews that it is totally distinguishable from the case before us.

From *Flight v. Leman*, and *Fitz John v. Mackinder*, we gather rules and principles which are decisive of this. They shew that in order to the statement of a legal cause of action, it was necessary for the plaintiff to aver first, that defendant maliciously instigated *Black Brothers & Co.* to sue and arrest; secondly, to aver that *Black Brothers & Co.* had not reasonable and probable cause for suing and arresting plaintiff, and thirdly, that defendant knew there was no such reasonable or probable cause. In the absence of the one necessary ingredient of the allegation of the want of reasonable and probable

cause, it does not appear (and here I adopt the expressive words of Lord *Denman*, above cited) "that the plaintiff has been unlawfully disturbed," He would have been unlawfully disturbed by means of the legal process set in motion, if defendant had maliciously, by and without reasonable and probable cause, instigated *Black Brothers & Co.* to use the process, and *Black Brothers & Co.* had, without reasonable and probable cause so used it. But there was a real debt due to the firm, for which they sued and arrested the plaintiff, and thereupon it may be added to the above that the real and probable cause existed in fact. In *Flight v. Leman* we have observed that *Patteson, J.*, spoke of the case as analogous to that of a complaint of malicious persecution or arrest. In view of that I find it impossible to distinguish, in point of principle, as regards the necessity for the amounts referred to, the case of a defendant instigating a third person to sue, from the case of a defendant suing himself, In both cases alike these appear to me to be essential ingredients to constitute a right of action for damages consequent upon the suing, and on these reasons I am of opinion that the rule should be made absolute.

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#### HAGARTY v. JAMES PRYOR ET AL., ALDERMEN OF THE CITY OF HALIFAX.

DEFENDANTS removed plaintiff's porch as a nuisance, and justified as being a committee of the City Council duly authorized to remove anything which was a nuisance, encroachment or annoyance on any of the streets. The evidence showed that the porch, which encroached upon the public street several feet, had been in existence just as it was when pulled down, for a period of sixty years. There was no evidence as to the origin or dedication of the street, and it did not appear whether the porch or the street were the more ancient.

*Held*, that in the absence of evidence as to the original laying out of the street, its dedication to the public should be taken as subject to the encroachment in question, and that the verdict for defendants should be set aside.

McCULLY, J., now, (January 15th, 1872,) delivered the judgment of the Court:—

This was an action of trespass, with a count in trover, and was brought by plaintiff to recover damages for removing the porch of his dwelling-house, situate on the west side of Pleasant street in the City of Halifax. Defendants justified



as a committee of the City Council, duly authorized in that behalf under the City Charter to remove encumbrances, and prevent encroachments upon the streets of the City, and to cause anything which might occasion a nuisance, encroachment or annoyance on any street to be removed. There were pleas of denial as well, and upon the trial amendments were made, but the gist of the controversy turned eventually upon the question whether the defendants, representing the City as a Committee of Streets, showed sufficient authority in themselves or the City to do the acts complained of, viz., to detach the porch from the plaintiff's house, of which it constituted part, and remove it away.

The jury found a verdict for defendants, and a rule *nisi* having been applied for and obtained to set aside the verdict and grant a new trial, the case involving principles of great importance, both as regards the public and individuals owning property fronting upon the public streets, it was argued at much length, and a good many cases ancient and modern were cited. The plaintiff himself proved that the porch was on the north end of his house, and there upwards of thirty years, when the late Bishop (of Nova Scotia) occupied the whole house. It was framed, he says, and attached to the house, it formed part of the hall; the stairs began just inside; the stairs had to be moved to make an inside porch; on the 3rd *September*, 1869 defendants removed the porch against the protest of plaintiff; he had to build a back hall in consequence, and a new staircase, at a cost, he states of \$1200; he lost also by way of rent, &c. On cross-examination he stated that he bought the property from *Mrs. Inglis*; the depth of it was 203 feet by the deed, but could not say if the porch was within the 203 feet or no. A notice of intention to remove the porch was admitted to have been received; notice dated 10th *July*, 1869, second notice 31st *August*; also notice from the plaintiff to the City dated 8th *October*. But these are not material to the present argument and inquiry. The plaintiff rested his case, and defendants proceeded to call witnesses. Some formal proof was given as to the authority of the defendants to act on behalf of the City, which is not controverted, and then *Robert Austin* was called, who proved a cutting down of the street in 1860, under *Mr.*

*Pollock*, then superintendent, from *Wallace* to *Morris* streets, 3 feet 6 inches at plaintiff's premises. He found a memo. of width of street, and that the porch projected there 4 to 5 feet; witness considered plaintiff's porch an encroachment. On his cross-examination he says: "The porch had been there 41 years; it rested on a stone wall; plaintiff's is the only house on line of street; lines produced north and south of plaintiff's house run into present line of street." By way of rebuttal plaintiff called *W. Foster*, 81 years of age, who knew the porch before he was married, 56 years ago, long before that. *James Keefer* recollected the porch 70 years. *J. C. Halliburton* recollected the porch 50 years, clearly 45. *Henry Spike*, 76 years of age, worked at it in 1816; porch built before that; new tarred before that; porch there as far back as he can remember, the same as when it was taken down. *W. A. Hendry* is called and proves a plan made upon a survey, and it shows the site of the street not bounded by straight lines.

This was the whole case in substance. The plaintiff and those under whom he claims, are clearly proven to have had possession of the house and porch in question, the latter precisely as it was when it was pulled down by defendants, for upwards of 60 years. Whether there was any street there when this porch was originally built there is no proof; which is the elder, the street or the porch, does not therefore appear. The line of the street, where plaintiff's house stands, is partly straight, but the porch confessedly protruded several feet east of the general line of the street, and was clearly an obstruction to the public passing and re-passing along the side-walk. Every foot passenger coming and going, who kept close to the general west line of the street, when he arrived at the spot must turn aside eastwardly some 4 or 5 feet, the depth of the porch, to get by it, and if he pursued his journey close to the line, that is the west line of the street, must return the same distance westwardly he had diverged eastwardly from a right line. That the porch was an obstruction to the street and to passengers there can therefore be no room for doubt. But was it a nuisance,—was it an illegal obstruction? That is the question. We have no evidence of the origin or dedication of the street in question,—whether it became a street by ancient use, by lost

grant, or how otherwise does not appear. For ought that does appear, the porch may have been there anterior to the existence of a street in that locality. But supposing that the street had its origin by dedication, *non constat* but the obstruction was there and existed at the time, and the dedication was subject to it. The cases cited by defendants' counsel from 2 *Best & Smi.*, 770, *Fisher v. Frowse*, and *Cooper v. Walker*, were very like the present in its more important features. The parties were reversed, that is, the defendant in *Fisher v. Frowse* occupied the relation to the strife that the plaintiff does here, and pleaded that the street was subject to the right of the occupiers of a house adjoining, to have steps in the highway, which steps were part of the house, &c. Plea held good. *Blackburn, J.*, delivering the judgment of the Court said: "We think the cellar floor having existed in its present condition as far back as living memory, the jury ought to draw a conclusion that it had existed as long as the street, and that the dedication of the way to the public was with this cellar floor in it, and subject to the reservation of its being contained there, so far as by law the highway could be subject to it. *Cowper v. Walker*, decided at the same time, involved precisely the same point, the difference being that in this case stone steps, obstructing and hindering persons using the steps, were the grievance. I need not transcribe the judgment, it is based upon the principle enunciated. And the Court says, moreover, that the law is clear that if, after a highway exists, anything be newly made so near to it as to be dangerous to those using the highway, &c., this will be unlawful and a nuisance. "But the question," says the Court, "still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful where the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. We think the latter is the correct view of the law." All the cases bearing upon the point, ancient and modern, appear to

have been carefully collected, cited and discussed in 2 *Best & Smith*, 770. The defendants' counsel pressed the Court with the 173rd clause of the City Charter, to show that streets in the City stand upon a different footing from ordinary highways. But I am not prepared to admit such a doctrine, nor is it necessary in the case to come to any decision upon that point; 1 *Pro. Laws*, p. 439. A Statute of 1801 was also cited as having a bearing upon the point in controversy, but the statute having long since been repealed, what was done or excepted under it, in the absence of any record, is too remote for living memory, and it has no legitimate weight or bearing in the controversy. Several *American* cases of great authority were cited by defendants' and by plaintiff's counsel, but there is no occasion to resort to them in support of the ground taken by the Court of Queen's Bench in 2 *Best & Smith*. On the part of defendant cases were cited to show that no length of time could avail to legalize a public nuisance. Be it so. But this is begging the question. The public right must exist before or when the obstruction is erected to constitute it a nuisance.

I prefer that the case be decided by the evidence adduced on the trial,—perhaps I might say, as more than hinted by his Lordship the Chief Justice who tried it, upon the absence of evidence on the part of defendants, as to the original laying out, dedication and user of the street, and I am clearly of opinion that the verdict is contrary to law and evidence, and the rule for a new trial must, therefore, be made absolute

## DODGE v. WINDSOR &amp; ANNAPOLIS RAILWAY CO.

PLAINTIFF delivered to defendants a roll of oil-cloth to be conveyed by them as common carriers. On arrival it was found to be damaged, and the plaintiff refusing to receive it, brought action for its full value. The defendants paid a small sum into Court. The amount of damage was variously estimated by different witnesses, the highest estimate being only one-third the alleged value of the roll. The Judge at the trial directed the jury that if they thought the damage exceeded the amount paid into court they should find for the plaintiff, otherwise for defendants. He further directed them that if the oil-cloth was not seriously damaged but easily repairable, the plaintiff was bound to receive it, and claim only damages, but if too seriously injured to fulfil the purpose for which he required it, he might claim its whole value.

The jury found a verdict for the full value of the roll, after deducting the sum paid into court.

*Held, WILKINS, J., dissentiente*, that there had been a misdirection; that the plaintiff could only recover damages to the extent of the injury he had suffered, and not the full value of the oil-cloth, and that the rule for a new trial should be made absolute unless the plaintiff would consent to have the amount of the verdict reduced.

Payment into court does not admit the full claim of plaintiff, but only the liability of defendant to the amount so paid in, and if the plaintiff would recover beyond that amount, he must prove that he is entitled to do so.

MCCULLY, J., now, (January 15th, 1872,) delivered the judgment of the Court:—

This was an action brought by plaintiff against defendants, tried before Mr. Justice *Ritchie*, in the opening circuit of 1871, and a verdict found for plaintiff. A rule *nisi* to set aside the verdict was obtained by the defendants, and was argued during the present term. *Weatherbe* and *Henry*, Q. C., supported the rule, and *Weeks* and *McDonald*, Q. C., showed cause. The grounds taken and relied on were that the verdict was against law and evidence, and misdirection.

The action was brought by plaintiff against defendants as common carriers, and set out in the usual way in the first count a contract to carry for hire from *Halifax* to *Middleton*, in *Annapolis* county, goods to be delivered by plaintiff to defendants. Delivery is averred, and all conditions performed, &c., and the breach assigned is non-delivery, whereby plaintiff was deprived of his goods for a long time, and the same was diminished in value. The second count charges defendants as carriers for hire, with having received of plaintiff a piece of oil-cloth for the floor of plaintiff of the value of \$20, to be carried from *Richmond* station, *Halifax*, to *Middleton*, aforesaid, and there delivered in good order and condition, but that defendants did not use due care and skill in the carriage of said goods, but broke and damaged the oil-cloth, whereby the

same was wholly lost to plaintiff. To this writ defendants pleaded ten pleas in all: 1st, that they did not promise as alleged; 2nd, goods not delivered to defendants for purposes, &c., as alleged; 3rd, goods were re-delivered to plaintiff within a reasonable time, &c.; 4th, goods improperly and negligently packed, &c., which caused the damage and loss, &c.; 5th, goods damaged before they came to defendants' possession; 6th, goods re-delivered in same order as received by defendants; 7th, denial that defendants were common carriers; 8th, did not receive the goods for the purposes, &c., alleged; 9th, defendants always ready to deliver plaintiff his goods in the same condition as received, and he refused to accept; 10th, payment of money, \$3.00 under the usual plea. Plaintiff replied money paid is not enough.

Plaintiff was residing at *Bridgetown*, and had ordered a piece of oil-cloth, 16½ feet square, from *Halifax*, to cover his dining room. On its arrival by the defendants' railway it was found to be broken or cracked, and more or less damaged. Its value was sworn to be nearly \$30. Plaintiff on seeing it, and the condition in which it was in, asked the conductor, being defendant's officer in charge, if the oil-cloth was in as good condition as when received by the company; his answer was "No." It had been placed on some barrels of flour in place of putting it on the floor of the car; the barrels were standing on their ends, and they took the barrels from under the end of the oil-cloth, and the package dropped at one end. It was done at *Wilmot*, and that caused the damage; plaintiff therefore refused to accept possession. This statement of facts by plaintiff stands uncontradicted. *Beales*, one of the witnesses, estimates the damage at \$10; the paint was broken and peeled up. *Morgan*, another witness of plaintiff, says it was cracked through nearly at the middle. The acceptance being refused by plaintiff, the oil-cloth was sent to *Kentville*, to defendants' warehouse. This was plaintiff's case.

The defence was in no material point contradictory or inconsistent with plaintiff's case, except as to the extent and amount of damage the oil-cloth had sustained. *Vernon Smith*, the manager of the road, estimated that a quarter of a dollar would repair the damage. *Lewis Dodge* valued the damage at \$2.50. *S. Pratt* had it unrolled, and got *Robertson*,

a first-class painter, to inspect it; witness valued the damage at 50 cents, but considers that would be a high price to pay for repairing it; witness was authorized to make plaintiff an offer, and offered him \$2 as a compensation (it is to be assumed for the damages). *Walker*, another of defendants' witnesses, says it could be repaired for 25 cents and be equally serviceable. *John Dodge*, a house-joiner: the damages could be repaired for 50 cents. *Bath. Reid*, a cabinet-maker, examined the cloth, and gives a minute description per diagram, and adds, "it could be repaired for 50 cents, it might not look as well." The plaintiff and other witnesses were re-called, but their testimony is not in contradiction to that of defendants' witnesses, and does not affect the issue materially.

His Lordship, on the plea of payment of money into Court, explained to the jury that if they thought the damage sustained by the plaintiff did not exceed the sum of \$3, they should find for defendants, otherwise for plaintiff. His further direction was that if the article in the case was not seriously damaged and was repairable the owner was bound to receive it, and could claim what would compensate him for the damage, but if it was so seriously injured that it could not be thoroughly repaired, he might refuse to receive it and claim its value, that in this case they would be at liberty to give the whole value of the oil-cloth, deducting the amount paid into Court, if they should think that taking into account the extent of the injury, and what has been said about its repair, the plaintiff could not reasonably have been required to accept it, having in mind the object for which he had purchased it, and the use to which he intended to apply it. The jury found a verdict for \$23.50, being the full value after deducting the amount paid into Court.

The main question for the Court to consider in this case is whether the jury were properly directed on the point of law arising out of the foregoing state of facts. In this Province there being no statutes qualifying the Common Law in reference to the responsibilities and rights of common carriers or railway companies, the naked question presents itself in case of non-fulfilment by this class of bailees for hire to complete their contract as to the delivery of goods in the condition in which they receive them, what is the law in reference to

damage of goods by a common carrier? and in whom is the property of a damaged chattel, as in this case, more or less injured, while in transition? In other words, is the owner of goods, being himself the consignor, as in this case, justified in refusing to accept them in their damaged condition, and in claiming from the carrier the entire cost of the article, by reason of his failing to perform his contract to deliver in good order? Or is the proper measure of damage the mere deterioration in value of the article by reason of the injury, giving no election to the consignee to refuse acceptance, the property and right of property continuing in himself?

On the part of defendant it was contended that there had been a misdirection. *Add. on Torts*, 490, and other authorities, were cited upon this point, but the cases they contemplate are an entire loss or destruction of the article, loss from non-delivery in time, and the like. But if this action is to be sustained, and the full value of the goods received, because of a partial injury, and that reasoning based upon the fact as it was put, that defendant has failed to fulfill his contract, the same reason should certainly apply when by carelessness or negligence or other unjustifiable cause the carrier fails in his delivery as to time, and the plaintiff is injured by a decline of price in the market. To the owner or consignee goods delayed may thus become comparatively valueless. But while cases as to the point in dispute here are difficult to find, and this may be, and probably is, because the plaintiff is attempting to establish a new principle, in other cases where carriers are in fault as to delay in delivery, the amount of damage and the principle as to measure and computation are well settled and clear. In *Simmons v. S. E. Railway Co.*, 7 Jurist, N. S., 849, Exch. Fish. Dig., 1500, *Bramwell*, J., said: "If goods are delivered too late by a carrier, the owner ought instantly to sell at market price and realize his loss, and the difference between the price he obtains by the sale at that time and that which he would have obtained, is the only measure of damage." And see *Wilson v. Lancashire & York Railway Co.*, 9 C. B., N. S., 632.

What pretence or reason can be urged why, if a carrier commits a breach of contract by neglecting to deliver goods in time, (intended perhaps for exportation), which in consequence



of the ship having sailed, or for other cause, the consignee no longer requires, that in that case the damage must be ascertained by sale, and yet if the breach seem by carelessness, so that the goods are deteriorated by a slight injury, there must of necessity be another measure of damage.

The numerous cases cited as between vendor and vendee, and the right to reject or return property, have no application here, and I have searched in vain to find a single case to show that negligence, carelessness, or misconduct of any kind on the part of a common carrier does more than entitle the contractor to recover damages for the non-fulfilment of his contract to the extent of the depreciation produced by the carrier's default. There is a large collection of cases in *Fisher's Digest*, under the sub-section "Damages," p. 1498, with nice and technical distinctions touching delivery, falling markets, prospective profits, &c., but nowhere do I find that the consignee or owner has an election that enables him to divest himself of the property, or the right of property in goods carried, whether injured or belated, and claim the full value from the carrier. To show how uncertain and capricious the rule would be if it rested with a jury to find when the consignee might or might not decide to abandon his goods no better case could be cited by way of illustration than the present. *Beales*, plaintiff's own witness, spoke of damage as high as \$10, or a little over one-third of the value of the article, but if the plaintiff had called an auction and sold the cloth, as he might have done, or had the damage appraised by competent judges, judging from what the other witnesses testify, it is by no means certain that the market value of the cloth was so much depreciated even as *Beales* represented. If the principle contended for by plaintiff had even had the sanction of an *English* court of law, viz., the right in special assumpsit to recover as here the entire value, surely some case to that effect could be found in the books. The absence of such a case, none was cited, and my research has not rewarded me with any, or any principle that underlies or would countenance such a position as is sought to be established, the absence of such, I remark, is only to be accounted for, I think, by assuming that the Common Law carrier, pretty well weighted with liabilities already, is not compellable

at the election of the owners to take all goods, damaged much or little in transition, and account to him for their full value. I am, therefore, of opinion his Lordship's direction on this point cannot be upheld.

It was then contended on the part of plaintiff's counsel that the payment of money into court on the declaration generally, was an admission not only of the contract as laid, of all conditions fulfilled, and of the breach, but of the total loss as set out in the second count. This position was urged with a good deal of confidence, but the Court on the argument expressed a pretty strong dissent from any such position. The doctrine of payment of money into court, and its effect upon the pleadings and the case, is to be found very ably and clearly discussed in *Taylor on Evidence*, secs. 760 to 765, both inclusive, and it will there be seen that no such consequence follows from payment of money into court as that contended for by plaintiff's counsel. At sec. 764 it is said that although payment into court admits the entire contract declared on, as also the specific breach in respect of which the payment is made, it does not admit any damages on that breach beyond the sum paid in, still less does it admit any other breach to which the payment does not apply. And the writer illustrated it thus: "Payment of money into court upon a count on a valued policy of insurance which states a total loss by caption, admits the contract and the caption, but not the total loss, and the plaintiff, therefore, must still prove that he has suffered damage from the caption beyond the sum paid." The law upon this part of the case was properly put to the jury, and before the plaintiff was entitled to receive damages *ultra* \$3 paid in, it was incumbent upon him to prove that he had sustained them.

Having carefully considered such of the cases cited on the argument as have a bearing on the controversy, in my view of the matter, it falls within that category of which *Luson v. Smith*, 4 N. & M., 304, is an exponent. In that case it was decided where, upon showing cause against a non-suit or a new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the Court will make the rule absolute, unless the parties consent that the damages

shall be reduced, in which case neither party pays to the other costs of the rule. See *Hussey v. Me. Railway Co.*, 20 L. T., N. S., 612; *Fisher's Digest*, 9640.

WILKINS, J., *dissentiente*.—I think that neither the direction of the learned Judge, which in my opinion was sound and clear, nor the verdict of the jury, is subject to any exception.

The breach in the second count is stated in these words: "Yet the defendants did not use due care and skill in the carriage of said goods, but broke and damaged the said oil-cloth, whereby the same became, and was, and is, wholly lost to the plaintiff." Thus the defendant company was informed that in consequence of its alleged breach of contract or of duty, the oil-cloth in question was so injured as to be to the plaintiff worthless. Now this one specific ground of claim is only answered by the 4th plea, which admits that the goods were wholly lost, but alleges that they were lost to the plaintiff as alleged by and through his own negligence and default in that behalf, and not otherwise. On the issue thus raised the jury have found for the plaintiff, and there is sufficient evidence to support the finding. Our judicial inquiry, then, is based on that finding. If the law warrants it the verdict must stand.

The view I take of the question before me renders it unnecessary to inquire into the legal effect of the plea of payment into court of the \$3, which sum has been paid on all the counts without distinction. Upon principle such payment clearly involves an acknowledgment that, in the words of the second count, in consequence of the neglect of the defendant company, the oil-cloth in question was so broken and damaged that it became and was wholly lost to the plaintiff. The only question, then, remaining, would be, what sum in damages would measure and requite that total loss?—a question raised by the replication denying the sufficiency of the payment made. What is the proper measure of the damages in view of the finding under the second count? Clearly the value of the chattel to the plaintiff at the place of delivery, if it had been delivered there by the defendant company in the condi-

tion in which the company received it. The damages in the verdict have been adjusted on that principle.

It will be shewn presently that the effect of the defendant company's paying the amount representing the price or value of the thing, either voluntarily or under legal coercion, is to invest the company with absolute property in the chattel. I am unable to perceive any reason in principle why, if this chattel has been rendered by defendants' want of due care as a carrier for hire received useless to plaintiff in relation to the purpose for which alone he required it, the company should not be obliged to pay the full value of it, and (receiving the chattel then made by force of law its own) have imposed on it the burden of making it available by sale or otherwise for the purpose of indemnifying the company.

The counts are what under the old system would have been counts in *assumpsit*, but our Legislature has done what in *England* the commissioners recommended but was not done, namely, abolished a distinction between forms of action in the writ or other proceedings (see sec. 2 of *Practice Act*) Formerly it would have been necessary in this case—it is not necessary now—to declare either in trespass on the case for a tort, or in trespass on the case on contract. Besides it has long been settled that proceedings against carriers may be at the election of the plaintiff in *tort* or in *assumpsit*. (See *Selwyn*, N. P., 459, title "Carriers.") I feel, therefore, that I am quite at liberty to consider the proceedings in this case to have had their origin in an action brought against the defendant company in *tort*, so far at least as to make applicable to the determination of it all authorities which refer to actions brought against carriers when sued in *tort*. In short, it is undeniable that the ingredient of *tort* enters into every such action as this from the mere relation of the parties to each other. That is a relation of the plaintiff bailor, and the defendant bailee carrying goods for hire, and liable by the custom of the realm, as well as by contract expressed or implied. *Kent* says (vol. 2, p. 506): "On a recovery by law in an action of trespass or trover, (and these alone are stated from the necessary generality of the terms of the rule as laid down by the commentator), of the value of a specific chattel of which the possession has been acquired by *tort*, the title of

the goods is altered by the recovery and is transferred to the defendant, and the damages recovered are the price of the chattel so transferred by the operation of law."

The principle of this plainly is, that where a party has been obliged to pay in damages the value of a chattel, property in the chattel rests in him. In *Adams v. Broughton*, 2 Str., 1078, plaintiff recovered in trover against the captain for yarn consigned to him. The captain obtained an injunction on showing the goods were delivered to the defendant, the plaintiff brought on an action against him and held him to bail, and the Court discharged him on a common bail, for by the former recovery the property rested in the captain, (now mark the reason given by the Court), "*the plaintiff having damages in lieu thereof*, and therefore in this action he could not say the goods were his." In the same case, reported by *Andrews*, the Court said: "The property in the goods is entirely altered by the judgment against *Mason*, and the damages required in the first action is the price thereof; so that he hath now the same property therein as the original plaintiff had, and this against all the world."

In a case, cited by *Kent*, we find: "A, in trespass against B for taking a horse, recovers damages; by this recovery and execution thereon, the property of the horse is vested in B; *solutio pretii emptionis loco habetur*, (i. e., payment of the value of the value of a chattel in damages is equivalent to a purchase of it). So, again, in *Shepherd's Touchstone*, p. 228, title "Gift," it is said: "So where one doth take my goods as a trespasser, and I recover damages for them in a suit at law, in this case the law doth give him the property of the goods; (why?) answer as the learned author goes on to say, "*because he hath paid for them*."

The form of action cannot possibly touch the principle of all these authorities. They include this very case, and in effect say, if this defendant company, (sued in *tort* and in *assumpsit*), is obliged to pay in damages the value of this oil-cloth, the oil-cloth thereupon becomes the property of the company, *because it has paid for it*.

## LANG v. FOREMAN.

A writ of attachment under the Insolvent Act of 1869, having been issued at the instance of plaintiff against defendant, the latter, three days before the return day of the writ, procured a rule nisi to set the attachment, the writ and other proceedings thereon aside. The rule was taken, among other things on reading the affidavit of defendant sworn before William Akins, designated as a commissioner for taking affidavits to be used in the Supreme Court, County of Colchester, and the affidavit of Joseph Norman Ritchie, sworn at Halifax before C. M. Nutting, designated as a Commissioner of Supreme Court, County of Halifax. The rule having been made absolute setting the attachment aside, plaintiff appealed on the grounds, among others, that the Judge in Insolvency had no jurisdiction to make the order, that the affidavits were improperly sworn, being required by the Act to be sworn by officers appointed by the Court, and that defendant's petition to set aside the writ was premature, in being presented before the return day of the writ.

*Held*, 1st, That the Judge possessed jurisdiction under section 20 of the Act which empowers him to entertain a petition to set aside the writ under the provisions of section 22.

2nd, That from the mere fact of the commissioners acting, there was a presumption in favor of their authority which must stand, until destroyed by evidence sufficient to annihilate it.

3rd, That it was left by the Act in the discretion of the party petitioning, whether he would await the return day or not, the words being, "May petition the Judge at any time within three days from the return day of the writ, but not afterwards." *Quære*, whether the writ could be set aside until actually returned.

The Act providing that the petition is to be heard and determined in a summary manner, "it is for the learned Judge to decide what that 'summary manner' of hearing shall be, and as regards the nature and effect of the evidence by which his determination is to be governed, provided it be legal and sufficient evidence."

The learned Judge having proceeded by order nisi.

*Held*, that that course was perfectly unobjectionable, whether viewed in regard to the discretion so exercised, or to the nature of the mode of proceeding itself.

A commissioner who is in practice and lawfully recognised by the Court (as would be Akins or Nutting) as an officer legally exercising a function so important, is within the meaning of the words of section 123, "A commissioner appointed by the Court."

WILKINS, J., now, (January 13th 1872,) delivered the judgment of the Court:—

On the 22nd of August, 1870, the Judge of Probate for the County of Halifax, and "Judge of the Insolvent Court for the City and County of Halifax," issued under the seal of this Court a writ of attachment, directed to the Sheriff of the County of Colchester, against the estate and effects of one James Foreman, (described therein as broker and dealer in exchange), returnable on the 13th of September then next. The writ is in the form prescribed in the appendix to the *Insolvent Act* of 1869. The application for the writ appears to have been made to the Judge under sec. 20 of that act, and to have been founded on the affidavits of George Lang, Henry D. Blackadar, and John McKenzie. Their contents disclosed such facts and circumstances as satisfied the learned Judge "that Foreman was insolvent within the meaning of the act,

and that his estate had become subject to compulsory liquidation." Afterwards, and on the 10th *September* of the same year, the learned Judge on the petition of *Foreman* granted an order *nisi* to set aside the attachment made under the writ, together with the writ, and other proceedings thereon, unless cause to the contrary should be shown before him on the twenty-first day of the last mentioned month. The order was made on reading the writ, the affidavits on which it was founded, and the affidavits of *James Foreman*, *James Steinson* and *Joseph Norman Ritchie*, with the exhibits attached, and also the petition of the said *James Foreman*. The affidavit of *Foreman*, dated the 9th of *September*, 1870, was sworn to at *Londonderry*, in the County of *Colchester*, before *William Akins*, designated as Commissioner for taking Affidavits to be used in the Supreme Court, County of *Colchester*. The affidavit of *Joseph Norman Ritchie*, dated the 10th of *September* in the same year, was sworn at *Halifax*, before *C. M. Nutting*, designated as Commissioner of Supreme Court, County of *Halifax*.

The learned Judge was moved to act in the matter last mentioned by a petition presented to him on the 9th day of *September*, (and therefore four days before the return day of the writ), by the said *James Foreman*, representing that he was not a trader, nor had been such since the operation of the *Insolvent Act*, also that he was not a debtor of the said *George Lang*, and praying that the writ and proceedings thereunder should be set aside. On the 20th of *October*, 1870, the learned Judge having, as his written judgment recites, on the 28th *September* and on subsequent days heard the case fully argued by counsel, delivered a judgment which concluded in terms as follows:—Having as I believe fully considered the points brought under my notice, I have only to repeat that if the plaintiff desires a hearing for the purpose of producing witnesses upon any points in the case, on application a day shall be appointed. In the event of the plaintiff not making the application within ten days from this date, the rule must be made absolute with costs. "This," continued the learned Judge, "is of course without prejudice to the plaintiff as to appeal, and the rule absolute is not to be taken until after the expiration of the ten days." On the 2nd *November*

following, the learned Judge gave the plaintiff leave to appeal from his order absolute dated the 31st October, 1870, setting aside with costs the writ of attachment and all proceedings thereunder. The grounds of appeal as stated at the argument do not differ from those taken before the learned Judge by the plaintiff, as we gather from the judgment. This jurisdiction in the matter before him was questioned, but nothing can be clearer than that the learned Judge possessed it. It was exercised professedly under sec. 26, and the case before the learned Judge was not that one only excepted case that is mentioned in the statute, viz., the case of a debtor who had presented a petition under and according to sec. 15. Sec. 20 prescribes the mode of proceeding to be adopted to place an estate in compulsory liquidation, in the Provinces of *Ontario*, *New Brunswick* and *Nova Scotia*, as distinguished from the Province of *Quebec*, to which the provisions of sec. 19 apply. In any case where no proceedings have been taken by a debtor under sec. 15, but in which a writ of attachment has issued in this Province under sec. 20, the Judge of Probate may entertain a petition to set aside the writ under the provisions of sec. 26, and such petition must be "heard and determined in a summary manner and conformably to the evidence adduced before the Judge therein." It is for the learned Judge to decide what that "summary manner" of hearing shall be, and as regards the nature and effect of the evidence by which his determination is to be governed, provided it be legal evidence and sufficient evidence, the learned Judge ought not to be interfered with by this appellate Court, to which his decision is made subject. The learned Judge thought proper to proceed summarily by order *nisi*, and I am of opinion that that course was perfectly unobjectionable, whether viewed in regard to the discretion so exercised, or to the nature of the mode of proceeding itself. The law required the learned Judge to determine conformably to the evidence adduced before him. A material part, if not the whole of that evidence, so far as the petition is concerned, consisted of the affidavits of *Foreman* and of *Ritohia*. The plaintiff insists they have not the character of evidence because the first was sworn to before *Akins* and the second before *Nutting*, neither *Akins* nor *Nutting*, as is contended,



being empowered to attest the affidavits sworn to before them. In support of this contention we have been referred sec. 123, which enacts that "any affidavit requiring to be sworn in proceedings in insolvency may be sworn before any commissioner for taking affidavits appointed by any of the Courts of Law or Equity in any of the said Provinces. Now it may be that neither *Akins* nor *Nutting* had been appointed a commissioner by the Court or by the Court of Equity; but I am not aware that I can take, or that the learned Judge below could have taken judicial notice that he had not been so appointed. This I know, that if an affidavit purporting to be sworn before either of these two persons designated as in the affidavits in question, had been presented before me, I should receive it and act on it, without enquiring into the actual authority of the person before whom it was sworn. That circumstance undoubtedly might have been inquired into if proper steps had been taken before the Judge of Probate in accordance with established practice.

The presumption of authority arising from the mere fact of acting as if authorized, and which we recognize daily, must stand until it is destroyed by evidence sufficient to annihilate it. *Cheney v. Courtois*, 13 C. B., N. S., 634, reviews all the previous authorities on this particular point of our inquiry, and those authorities show the length to which the Courts have gone to support the jurat of affidavits, even where, in strictness, defective, *ut res magis valeat quam pereat*. Of course it is obvious, that in the particular case to annul judicially, in our appellate jurisdiction the evidence on which the judgment of the learned Judge below rests, assuming that judgment to be right, on such a mere technical ground as that on which that evidence is impugned, would be in view of the consequences, which in such a case we ought to regard, perfectly monstrous. There cannot be the least doubt that either of the defendants, if he has sworn falsely, can be convicted of perjury. Moreover, I am prepared to hold that a commissioner who is in practice and in fact lawfully recognized by this Court, (as would be *Akins* or *Nutting*), as an officer legally exercising a function so important, is within the meaning of the words of sec. 123, "a commissioner appointed by this Court." No unwarrantable liberty is taken

with the word "appointed" in the connection in which it is presented, to construe it in the sense of "legally sanctioned," or "legally designated."

Another ground of appeal is that the petition of *Foreman* was presented prematurely, and that he was bound to defer it until after the return day of the writ. The words of the section are: "May petition the Judge at any time within three days from the return day of the writ." It is insisted that they require that the petition shall not be presented until that day, although the right to petition is extended to the period of three days next ensuing such return day. The words that immediately follow those referred to show the true construction of the former, and answer the objection taken. They are, "but not afterwards." These last show that the Legislature merely intended to fix three days after the return day of the writ as the utmost limit up to which the privilege of petitioning should be exercised, leaving it discretionary with the party desiring to petition to await the return day of the writ or not. The Legislature has not said that the petition shall not be presented before the return day. There could be no conceivable reason in the legislative mind to require petitioning to set aside the writ to be deferred until the return day. There would be a reason why the writ should not be actually set aside, perhaps it could not be set aside by the Judge until it was actually returned.

It only remains to inquire whether the learned Judge below, in determining, as it appears by the rule absolute he did determine, to set aside the writ, had evidence adduced before him to warrant that decision. I am of opinion that placing the contents of the affidavits of *Foreman* and *Ritchie* in the one scale, and those of the affidavits whereby *Lang* supported his application for the writ, with those of the other affidavits subsequently adduced by him in the other, the learned Judge below had sufficiently preponderating evidence before him to support his determination to set aside the writ within the intendment of sec. 26. I the less hesitate to form this conclusion when I reflect that *Lang* declined the privilege which the learned Judge conceded to him to produce further evidence to establish, first, that *Foreman* was a trader within

the meaning of the act, and, secondly, to show that *Lung* was *Foreman's* creditor and not his debtor.

I purposely forbear from expressing further than must be implied from what has been stated, any opinion as to what constitutes a trader under the *Insolvent Act* of 1869, or as to what steps are required to be taken in the Probate Court in order to place an estate in compulsory liquidation. My opinion is that the order absolute of the learned Judge below should be confirmed, and with costs.

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### SILVER ET AL. v. PETITMAITRE.

A *ORDER nisi* was obtained from a Judge of the Supreme Court to set aside a writ of attachment in a suit depending in the Insolvent Court. No certiorari or other proceeding had issued to bring the cause up to the Supreme Court.

*Held*, that the proceeding was *coram non judice*. The rule *nisi* was discharged.

McCULLY, J., now, (January 15th, 1872,) delivered the judgment of the Court:—

This is a suit depending in the Insolvent Court, the writ of attachment in which issued the 10th *May*, 1870, and is signed by *William Howe* as Registrar, under an order issued by *William Sutherland*, Judge of Probate for *Halifax* County, based upon affidavits of plaintiff and others. On the 17th *May*, 1870, *Harris H. Bligh* makes an affidavit in the cause, sworn to before *C. M. Nutting*, a Commissioner of the Supreme Court, setting forth the above facts, and attaches copies of the papers above referred to, and applies to and obtains from Mr. Justice *Dodd*, a Judge of the Supreme Court, an order *nisi*, returnable at Chambers, to set aside the writ of attachment and the order therefore for alleged irregularity, because the writ was signed by the *Registrar* and not the *Judge* of Probate, and because the order has no date. This order bears date the 17th *May*, returnable the 24th, 1870, and contains a stay of proceedings.

The cause was entered on the docket of arguments by what authority does not appear, and came up and was spoken

to by *McDonald* on behalf of the order and *Thompson*, *contra*. But the proceeding is *coram non judice*. The cause is not in the Supreme Court. It was commenced in the Court of Probate, and no *certiorari* or other proceeding has ever issued to bring it here. The Judge who granted the order *nisi* does not appear to have any jurisdiction in the case. His order was returnable to Chambers and not to this Court. It is true that endorsed on the copy of the order *nisi* is an agreement between the attorneys, extending it to *July* term, and touching an amendment as to the date of order for attachment, but this confers no jurisdiction. Nor is any authority cited to show that a stranger can intervene as in this case to set aside a plaintiff's process in a cause; for aught that appears he is in no way interested, either as plaintiff, defendant or otherwise. The order *nisi* must be discharged.

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### LEBLANC v. CUTTER ET AL.

Is an action for entering plaintiff's land, breaking open a barn, and destroying contents. plaintiff was clearly proved to have been in possession at the time of the commission of the trespass complained of. A verdict having been found for plaintiff, and a rule obtained to set the verdict aside.

*Held*, that plaintiff being proved to be in possession, it was incumbent upon defendant to show by clear and positive evidence that the right of property was in him, and he having failed to do so, the verdict could not be disturbed.

DESBARRES, J.—now, (January 15th: 1872,) delivered the judgment of the Court:—

This was an action for entering the plaintiff's land and breaking open and entering his barn, situate at the *South Joggins*, in the County of *Cumberland*, destroying and breaking to pieces the doors of the barn, &c., and cutting away and tearing down stands constructed therein for plaintiff's horses, and casting out and destroying the plaintiff's hay, oats and straw. The defendants by their first plea deny the entry into plaintiff's land, and the breaking into and opening his barn; secondly, they say that the lands and barn were not the lands and barn of the plaintiff; thirdly, that the lands and barn, &c., were the lands and barn of *George W. Cutter*,

one of the defendants. There were two other pleas to which it is unnecessary to refer, those I have mentioned being the main and only pleas relied upon as a defence to the present action.

It appears from the evidence of the plaintiff that having rented a house and barn with certain land, situate at the *South Joggins*, from *Gilbert Seaman*, a son of *Amos Seaman*, the former owner of the *Minudie* estate, he, the plaintiff, entered into possession of the premises on or about the first of *January*, 1868, being a couple of months after his tenancy commenced, which was to continue for six months at a rent of between \$60 and \$70, being allowed the privilege of cutting and taking away timber off the woodland of the lessor; that shortly after he had entered into possession of the premises, *Cutter*, the principal defendant, accompanied by the two other defendants, *Wilson* and *Babine*, came there and ordered him to quit the premises, giving him but half an hour to do so, and telling him "if he did not clear out he would clear him out;" that the plaintiff not having complied with this unexpected and peremptory order, the defendants then proceeded to carry out the threat made, by forcibly breaking, and entering into the plaintiff's barn, and committing the various acts complained of, all of which are detailed in the report of the learned Judge before whom the case was tried. The plaintiff in his cross-examination states that when he moved into the house *Judas Bourke* and his family were there, and that he permitted *Bourke* to remain in, and to occupy part of the house under him; that a man named *Spencer* was also in the house and moved out shortly after plaintiff came there, having been notified and required to quit by *Gilbert Seaman*. The plaintiff does not state by whose authority *Bourke* and *Spencer* entered into the house, but it appears from the testimony of *Amos Seaman*, one of the plaintiff's witnesses, that *Bourke* occupied under *Rufus* and *Gilbert Seaman*, and that he continued to occupy the house after *Cutter* got his lease. This witness further states that the barn was built after *Cutter* received his lease, for a shanty for *McGrath*, who worked under *Cutter*, and, as he thinks, occupied it in the summer of 1867. The testimony of the plaintiff's wife corroborates his own testimony as to the defendants' breaking and

entering into the barn, &c., and throwing out of doors the property he had in it.

Being, then, clearly in possession of the barn as the tenant of *Gilbert Seaman*, who claimed a right of property therein, the plaintiff had a right, whether *Gilbert Seaman* was or was not the true owner of it, to maintain an action against any person encroaching on his possession, not being the legal owner, and therefore the only question to be considered in this case is, whether *Cutter*, by whose command the acts complained of were committed, had at the time a legal right to the property, and was justified in entering into the barn and wresting the possession of it from the plaintiff.

*Cutter* claims under a lease from *Amos Seaman*, the original owner of the *Minudie* estate, dated May 1st, 1862, whereby *Amos Seaman* demised to him "all those certain quarries," &c., (here read the description in the lease). This then was a lease of certain grindstone quarries and reefs of stones at the *South Joggins*, for the working of which certain privileges were granted to *Cutter*, the lessee, by the lessor; among these was the right to occupy the sheds, buildings and erections at *Lower Cove*, and to exercise such control of the lands and premises within the limits defined as might be required for the working of the quarries. We must, therefore, carefully read the evidence to see if it is sufficient to show that the barn of which the plaintiff was in possession, and on which the defendants forcibly entered, was one of the buildings contemplated by, and included in the lease from *Amos Seaman* to the defendant *Cutter*; for upon this important fact the defence in this case entirely depends. In *Bainbridge's Treatise on the Law of Mines and Minerals*, p. 135, speaking of mining leases for the working of coal and other mines, he says: "All rights which are not implied by law, such as the right to erect houses for workmen, furnaces and buildings for smelting and refining ores, for making use of any of the other materials on the lands not included in the grant must be expressly mentioned; for however important they may have been in the contemplation of the parties, they are not strictly necessary for the full operation of the grant or lease. In short, all rights which are not obviously implied by

law, and which are intended to be conferred, should be clearly expressed on the face of the instrument." Now it is clear that while the lease gave *Cutter* the right to occupy the buildings that were then erected at *Lower Cove*, and to exercise control of the lands and premises within the limits defined in it, it gave him no right to erect any buildings there, and as it appears from the evidence on both sides that the barn in question was erected by the two *McGraths*, not for *Cutter* but for themselves, long after the lease from *Amos Seaman* was executed, two questions arise, first, was the barn erected within the limits defined in the lease? and, secondly, if so erected, was it a building which *Cutter* had a right to take and occupy for the purpose of working the grindstone quarries? The first is the more material question of the two, for if we could come to the conclusion that the barn was actually built within the limits defined in the lease, the claim set up by *Cutter* to it would, I think, be materially strengthened, but the evidence, as I read it, does not go far enough, inasmuch as it does not show that the barn was actually built within the limits defined, as I think it ought to have done in a case like this, where the defendants have ventured to commit acts which none other than a person lawfully entitled to the property could justify.

The evidence of the defendant *Cutter* is inconsistent with itself and by no means satisfactory. He says: "The house and barn are situate at the *South Joggins, Lower Cove*; I received possession of the house and barn in question under my lease; *Judas Bourke* then occupied the house; he entered on my work and continued till the fall of 1868, and paid me rent for the house." So far as the house is concerned it may be assumed that it was one of the buildings which *Cutter* had a right to occupy in working the quarries. In the very next sentence he says: "The barn was put up in the spring of 1867; *Thomas and John McGrath* built it for occupation while working in my quarries; I bought it when they left in the fall of 1866." In making this latter statement he either made a mistake or stated what was obviously incorrect. He adds: "I informed the plaintiff the building, (referring to the barn), was mine, and that I had bought it from the *McGraths*." In his cross-examination he says: "The

*McGraths* paid me for the lumber wherewith the barn was built," thereby admitting it to have been built by them for and on their own account, a circumstance which, in the absence of proof to the contrary, would justify the inference that it could hardly have been built on the land over which he, *Cutter*, had a right to exercise a control, for if it had been, it is not to be supposed he would have purchased it, knowing it to be his own. The evidence of *Alex. Wilson*, the other defendant, who was also examined on the part of the defence, is more against than in favor of the claim set up by *Cutter*. In his direct examination he says that when the *McGraths* left the barn was in possession of *Cutter*, but in his cross-examination he says that what he meant by saying that *Cutter* was in possession of the barn when the *McGraths* left was that they were paid for it, and that it was in *Cutter's* property; but when it is considered that *Cutter* himself does not venture to say that the barn was within the limits of the land described in the lease which he was to occupy in connection with the quarries, but little weight ought to be attached to that statement. He adds: "The land is entirely open where the barn and house are, except a fence put up by *Gilbert Seaman*; the fence of *Seaman* is between the barn and the company's works." If in making that statement he meant it to be understood that the fence divided the land claimed by *Seaman* from that held by *Cutter* under the lease, and that the barn was within that fence, it was at once destructive of the defence. It may be that he did not mean it to be so understood; but I cannot help thinking that it was a great oversight to leave so important a fact as this in doubt and uncertainty,—a fact which, if established, must have put an end to this suit.

The remaining witnesses examined on the part of the defence gave no information whatever as to the boundaries of the land which *Cutter* was entitled to occupy in connection with the quarries. On this point they, like *Cutter* himself, are silent; and yet the Court is asked to set aside the verdict found for the plaintiff on the ground that the barn in question was situate on the land described in, and covered by the lease, and consequently the property of *Cutter*, one of the defendants.



At the close of the defence *Gilbert Seaman* was called as witness, and proved that he had put the plaintiff in possession of the property in question, and that he built a fence in 1861 to protect it, and that he had made a railroad running 40 or 50 feet from the barn, which stood south of the railroad. In the absence of any plan marking out the locality and position of the barn, and of evidence to satisfy our minds that it was within the limits of the lease, we cannot say that it was the property of the defendant, *Cutter*, and that he and the two other defendants acting under his authority and committing the acts with which they were charged, were at all justified. It is enough for the purposes of this suit that the plaintiff was clearly proved to be in possession of the barn at the time the trespasses were committed, and being in possession it was incumbent on the defendant, *Cutter*, to show by clear and positive evidence that the right of property was in him. That he certainly has failed to show, and for that reason we think the verdict cannot be disturbed.



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A rule having been taken out to set the verdict aside, the Court were equally divided.

SIR W. YOUNG, C.J., was of opinion that a use in common of the dock not having been expressly declared, it could not be inferred.

DES BARRÉS, J., was of opinion that the exclusive uses by J. G. and those claiming under him precluded any inference from the clause of the agreement recited as to the existence of a tenancy in common.

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## ASSESSMENT OF BANKS.

By chapter 45, R. S., (3rd series), "Of County Assessments," sec. 15, it was enacted that the words "personal estate" and "personal property," for the purposes of the Act, shall be understood to include "all such goods, chattels and other property," as were enumerated in schedule A, thereto annexed, "and no other." The only portion of schedule A applicable was as follows:—"All personal chattels of every kind and description at their actual cash value."

The Bank of Yarmouth having been assessed under the above enactment, as personal estate, for \$20,000, the average amount of cash on hand, and for \$100,000, cash lent out.

*Held*, that the Bank was liable to be assessed for the average amount of stock on hand, and the value of personal property exclusive of stock, but not for the amount of cash lent out.

The phrase "personal chattels" means "only such things as animals, household stuff, money, jewels, corn, garments, and everything else that

can be put in motion, and transferred from place to place, but " does not include choses in action, notes of hand, bonds, and securities for money loaned or due, which may be realized upon by action or suit or otherwise.

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## ATTACHING CREDITOR, RIGHTS OF AGAINST CREDITOR'S ASSIGNEE.

J. C. died about the year 1862, possessed of a fund amounting to £8538 2s. 4d., which he devised to trustees upon certain trusts in favor of his daughter and others, and upon failure of such devise, then to his nieces or their lawful issue. The original devise in the will having failed, a rule was passed in the Equity Court, on a suit instituted by the trustees, by which it was ordered that a portion of the fund should be distributed and paid by the trustees, in certain proportions, among the next of kin of the said J. C.

M. W., being entitled as one of the next of kin, with J. S. W., her husband, executed a power of attorney to S., empowering him to receive the money coming to her by virtue of the said will. On the 3rd April, 1868, S. received under said power the sum of \$1927 which, on the same day, was attached in his hands by E. B. on process issued against J. S. W., the husband, as an absent or absconding debtor. On the 23rd February previously, J. S. W. had been adjudicated a bankrupt in England, and a creditor's assignee was appointed. Notice of this was received by S. on May, 21st, 1868, but no notice of the bankruptcy had been received by E. B. at the time of the issue of the attachment process. S. was notified by M. W. on July 29th, 1868, that she claimed the fund in question in her own right, and she followed this up by a suit in Equity.

*Held*, on a case prepared, that the creditor's assignee was entitled to the fund as against E. B. the attaching creditor.

*Held* also, that the bankruptcy of J. S. W. determined the power of S. to receive the fund, that it had not been reduced into possession, and that it, therefore, must be treated as if still remaining in the hands of the trustees.

*Held* also, that the creditor's assignee was not entitled to the fund without making provision for the wife, and that the latter, being entitled to the fund as a *chose in action*, was justified in coming into Equity for her protection.

*Held* also, that as J. S. W., the husband, was a bankrupt, and the sum in controversy not large, and M. W., the wife, being without any provision by a settlement made before or at the time of her marriage, the taxable costs being first paid, the balance of the fund should be paid or secured to her for her own benefit.

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1. Rule *nisi* to set aside an award discharged with costs, there being no imputation on the good faith of the arbitrator, and his award appearing from the facts and pleadings to be just and reasonable.

The application to set aside an award must be made at the earliest opportunity after it has been given, and the rule *nisi* must be expressed as having been granted on reading the rule of reference, and the award, &c.

*Harris v. McCormick* ..... 21

2. Defendant, a barrister, being in partnership with J. G. T., the firm, as solicitors for Mrs. McS., collected certain large sums of money, which, instead of paying over to her, they appropriated to their own use. Plaintiff having brought action for the amount, the matter was referred to arbitration, and an award made in her favor, which defendant now sought to have set aside, mainly on the ground that the award was unjust and incorrect, because defendant was held liable for the total amount received by the firm, instead of, as he contended, only for the amount he has individually misappropriated. There were other objections taken by defendant to the award of a technical character. One of these was that the other defendant had not signed the reference. He had, however, attended the reference. The other objections were successfully met by affidavits.

*Held*, that the award should be sustained.

*McSweeney v. Wallace et al.* ..... 83

3. Appeal from an order discharging an order *nisi* to set aside an award made in favor of plaintiff. The award proceeded mainly on evidence taken under a commission executed in England, but this did not appear from the award itself, nor did it contain the grounds of the arbitrator's decision. This commission and the evidence taken thereunder had been returned to the prothonotary and opened by him in the presence of the plaintiff's counsel alone, without any notice given to the defendant's counsel, then handed to the plaintiff's counsel, and by him produced to the arbitrator, and under protest of defendant's counsel read to and considered by the arbitrator. But with the exception of this objection the defendant's counsel, although a period of eighteen months had elapsed since the award, had taken no steps to object to the mode in which the evidence under the commission was taken, or to the legal character of that evidence, nor was any such pointed out at the argument. The arbitrator, however, had promised to consider any authorities which defendant's counsel might present to him on this subject, and had made the award without having a further hearing.

*Held*, that the application was made too late.

Appeal dismissed with costs.

*Silver et al v. McCulloch* ..... 104

4. J. T. and J. M., arbitrators, being agreed that a certain sum was due by the defendant, but differing as to the parties by whom the action could be legally brought, by a memorandum endorsed upon the submission, appointed J. W. R. as umpire. The latter having heard from the arbitrators the statement of facts, in which they both concurred, decided that the plaintiffs were the proper parties, and so awarded in conjunction with the arbitrator with whom he agreed.

The defendant took exception to the award on the grounds, 1st, that he had not acquiesced in the appointment of the umpire; 2nd, that the umpire had not himself heard the evidence of the parties; and 3rd, that the defendant had no notice of the appointment or opportunity of producing testimony.

After argument the case was referred back to the umpire with instructions to cite the parties before him to enable them to be heard with their witnesses.

Sir W. YOUNG, C.J., while consenting to the cause being referred back, was of opinion that the award was sustainable, and that the rule for setting it aside should be discharged.

*Eaton et al v. Campbell* ..... 314



**AVERAGE, ADJUSTMENT OF.**

Defendant, a British subject resident in this Province, insured his brigantine on a time policy with the plaintiffs. The vessel while on a voyage from Liverpool, G. B., to New York, sustained damage which was the subject of general average. The average was adjusted at the port of destination, and was pleaded by defendant as a set-off to an action on the premium note. It appeared that the average, as adjusted at New York, amounted to a larger sum than if adjusted in Nova Scotia.

*Held*, that the underwriter is bound to reimburse all such general average charges as have been assessed on the insured by a foreign adjustment. Also, that a time policy, unless there be special restrictions, confers the power of sailing from any port, domestic or foreign, and, in this Province, foreign employment must be understood to be as much in the contemplation of the owner as domestic use.

*Semle*, that the foreign adjustment to be binding must be clearly proved to have been made in strict conformity with the laws and usages of the foreign port, and would, doubtless, be set aside for fraud or gross error.

*Avon Marine Ins. Co. v. Barteaux* ..... 195

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*See* TROVER. 2.

**BANKS, ASSESSMENT OF.**

*See* ASSESSMENT OF BANKS.

**BANKRUPTCY.**

*See* ATTACHING CREDITOR.

**BILL OF EXCHANGE.**

The plaintiff made large advances to defendant, owner of the brig *C. Lovett*, and received a bill of exchange drawn by the captain of the vessel in his favor for the full amount of the freight to be earned by the voyage on which she was then proceeding. The bill was drawn upon Baring Bros, who advanced the amount of it to plaintiff. The vessel failed to complete her voyage, and the insurers on freight paid only for average to the amount of about one-half the bill of exchange, which was credited. Defendant being called on to pay the balance pleaded laches in relation to the bill.

*Held*, that the bill in question could not be treated strictly as a bill of exchange, but rather an appropriation of the freight, which had partially failed. Defendant was held liable to make up the deficiency.

*Brett et al. v. Lovett* ..... 472

**BILL OF SALE.**

*See* REPLEVIN.

**CANCELLATION OF STAMPS.**

A promissory note was duly stamped, but the maker had, by way of cancelling the stamps, simply written his initials upon each stamp, without adding the date.

*Held* a sufficient cancellation.

*McNiel v. McIntosh* ..... 67

**CARRIERS, COMMON.**

Plaintiff delivered to defendants a roll of oil-cloth to be conveyed by them as common carriers. On arrival it was found to be damaged, and the plaintiff refusing to receive it, brought action for its full value. The defendants paid a small sum into Court. The amount of damage was variously estimated by different witnesses, the highest estimate being only one-third the alleged value of the roll. The Judge at the trial directed the jury that if they thought the damage exceeded the amount paid into Court they should find for the plaintiff, otherwise for the defendants. He further directed them that if the oil-cloth was not seriously damaged but easily repairable, the plaintiff was bound to receive it, and claim only damages, but if too seriously injured to fulfil the purpose for which he required it, he might claim its whole value.

The jury found a verdict for the full amount of the roll, deducting the amount paid into Court.

*Held*, WILKINS, J., *dissentiente*, that there had been a misdirection; that the plaintiff could only recover damages to the extent of the injury he had suffered, and not the full value of the oil cloth, and that the rule for a new trial should be made absolute unless the plaintiff would consent to have the amount of the verdict reduced.

Payment into Court does not admit the full claim of plaintiff, but only the liability of defendant to the amount so paid in, and if the plaintiff would recover beyond that amount, he must prove that he is entitled to do so.

*Dodge v. W. & A. R. Co.* ..... 537

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**EXEMPTION FROM RESPONSIBILITY OF.**

In the absence of legislative enactments of a restraining character, a railway or steamboat company may impose such terms upon the public as to exempt the company from responsibility for injury however caused, including, therefore, gross negligence, and even fraud or dishonesty on the part of their servants.

*Dodson v. The Grand Trunk Railway Co.* .. 405

**CAVEAT EMPTOR, APPLICATION OF MAXIM.**

*See Brundige v. Delaney*, p. 63.

**CERTIORARI.**

*See PRACTICE.*

**CITY RAILROAD, LIABILITY OF FOR DAMAGES CAUSED BY RAILS.**

The Halifax City Railroad Company was bound by its charter to keep its rails on a level with the roadway. The rails were not so kept, and damage having resulted to plaintiffs using the streets with their horses and carriages,

*Held*, that plaintiffs had a right of action against the Company which was not defeated, although the course adopted for avoiding the damage might not be the best, provided the efforts to escape injury was earnest and sincere and not grossly inappropriate. Also that the authority given to the City Council to supervise and direct the repairs of the rail road was merely directory and not of such a character as to affect the right of action of individuals injured directly against the Company.

DODD and WILKINS, J J., *dissentied*.

*Conlon et al. v. The City Railroad Co.* ..... 200

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COMMISSIONERS OF SEWERS, &c., QUALIFICATION FOR  
APPOINTMENT AS.

Plaintiffs, as Commissioners of Sewers for the district of B. and M. brought action against the defendant for certain dyke rates assessed on the owners of marsh lands in that District for constructing and repairing necessary dykes, &c. Defendant pleaded that plaintiffs were not Commissioners of Sewers for that District. The act regulating the appointment of such Commissioners provided that on being appointed they should be sworn into office by a Justice of the Peace, and that such swearing should be entered in the Commissioners' Book of Record. It appeared that only one of the plaintiffs had fulfilled this requirement, but all three had acted as commissioners for several years.

*Held*, that in thus directing as to the entry of the swearing, it was not intended by the Legislature to shut out all other proof of qualification, and that there was sufficient evidence aside from this to afford the presumption that the plaintiffs were legally appointed and duly authorized to act in this assessment.

*Baker et al. v. McFarlane* ..... 94

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*See INSOLVENT ACT OF 1869.*

OF REVISED STATUTES.

Chapter 134 Revised Statutes, (3rd Series), "Of Pleadings and Practice in the Supreme Court," section 197, in reference to the filing of bail in cases where the Judge has refused a rule *nisi* for an appeal, and an appeal is taken under the statute, is confined in its operation to private parties, and does not extend to the Crown.

The proceedings having been instituted in the name of the Attorney General of Canada, a rule *nisi* was taken out to set them aside, on the ground that the Attorney General of Canada not having been admitted a barrister or attorney under Revised Statutes, (3rd Series,) chapter 130, was not qualified to subscribe a writ in this Province.

*Held*, that the objection not having been taken until after a plea pleaded and a trial had, had been waived.

*Semble*, that the signing of process in the manner excepted to, if objectionable at all, was merely an irregularity and not a nullity.

*The Queen v. Ryerson* ..... 274

## CONTRACT.

1. Action for not accounting in the sum of £800, and also for non payment of a promissory note for £100. Defendant pleaded fraud and misrepresentation, and that the vessel, the subject of the contract, had not been completed by plaintiff according to the terms of the agreement between them, but was unseaworthy, and also a set-off for expenses incurred in consequence thereof.

It appeared that the plaintiff, being engaged in building a vessel, in July, 1864, transferred her while on the stocks to defendant by bill of sale, and at the same time gave him a lease of the building yard. The vessel was completed by defendant, and in July, 1865, was delivered to him, and he signed an agreement to pay for her. There was no warranty required or given, and no proof of any fraud or misrepresentation on the part of plaintiff.

*Held*, that as the defendant had had the fullest opportunity of inspecting the vessel while in progress of completion, and of exercising his own judgment upon her, the maxim *caveat emptor* applied, and he was excluded from giving evidence as to her being unseaworthy.

Also, that it was not open to the defendant to impeach the note unless there was a total failure of consideration, his proper remedy for any partial failure being by cross action.

Also, that evidence under the plea of set-off was properly excluded.

*Brundidge v. Delaney* ..... 62

2. Plaintiff gave his note for the deposit required on a purchase at auction, but subsequently refused to carry out the contract, and sought to recover the amount of his note.

*Held*, on the authority of *Black v. Gesner* and *Gray v. Whitman*, Thomson's Reps., 157, that he could not recover.

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3. J. C. C., being indebted to the plaintiff, telegraphed as follows: "I owe Daniel H. Pitts \$1400. \* \* \* \* \* Will give you deed of property and confession of judgment if you accept amount," &c. Defendant, on the same day, replied: "Forward me the security and will accept draft at the time you mention." The orders were presented for acceptance, which was refused on account of the non-arrival of the securities, but defendant said that when the securities arrived he would accept. The title to the property referred to was in A., to whom a balance of \$300 was due on account of the purchase money. Plaintiff, in order to complete the title, gave his note to A. for the amount so due and procured a deed to be made in the name of defendant. The deed was tendered to defendant but he refused to accept, partly on account of the delay, and partly because the title to the property was not in J. C. C. at the time of the request and promise to accept.

There was some evidence of a distinct contract between plaintiff and defendant that if the former would procure the deed of the property the latter would accept, but the learned Judge who tried the cause instructed the jury that the only contract was that expressed in the telegram of J. C. C., and defendant's reply thereto, and that this was a contract upon which the plaintiff could not maintain an action, and withdrew from the consideration of the jury the evidence as to a contract between plaintiff and defendant, and the question as to the reasonableness of the delay. The jury found for defendant and a rule for a new trial was taken under the statute.

*Held*, per SIR W. YOUNG, C. J., JOHNSTONE, E. J. and DESBARRES, J., DODD and WILKINS, J. J., dissenting, that the rule for a new trial must be made absolute.

*Pitts v. Taylor* ..... 378

**CONTRACT, FRAUDULENT, WILL NOT BE AIDED BY THE COURT.**

In an action for money had and received, the defendant pleaded, by way of set-off, a promissory note given by plaintiff to defendant. From the evidence it was apparent that the transactions between the parties out of which the present cause of action arose were intended to defraud the creditors of plaintiff, and that the plaintiff and defendant were *in pari delicto*.

*Held*, that such being the case, the plaintiff should not be aided by the Court in enforcing his contract, and the verdict for him must be set aside.

*Blake v. Stewart*. . . . . 70

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\_\_\_\_\_, LIABILITY OF COMMON CARRIERS FOR.

*See* CARRIERS, common.

**DEED, PRIORITY OF, AS AFFECTED BY NOTICE.**

ONE Hazel on the 19th August, 1865, executed a deed to plaintiff of a certain lot of land, and on the 24th another deed of a second lot, both of which deeds plaintiff had recorded on the 25th. On the 3rd May previous Hazel had given a deed of the same two lots to defendant which, however, was not recorded by him until after plaintiff's deeds. Plaintiff had notice of this deed when he received his second deed but not when he received the first. The jury found that the deeds to plaintiff were *bona fide* and for good consideration, whereas the deed to defendant was made for the purpose of defrauding Hazel's creditors.

*Held*, that under these findings plaintiff must succeed, his knowledge of the existence of defendant's deed at the time he received his second deed having no effect upon his title, as that deed was fraudulent.

*Fielding v. Ackery*. . . . . 526

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## DESCRIPTION IN DEED, CORRECTION OF ERRORS IN.

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## DEVISE TO EXECUTORS.

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*Williams et al v. Myers* ..... 157

## DISCRETIONARY POWER OF EQUITY COURT.

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## DISTRESS, ILLEGAL.

PLAINTIFF was tenant to defendant, who distrained for the first quarter's rent before the expiration of the first month. There was no evidence to show that the rent was payable in advance. Defendant's wife gave security for the month's rent. About the middle of the second month the defendant distrained again for the first month's rent.

*Held*, that even if the first distress was legal, the defendant was not justified in the second, as the plaintiff had committed no act to prevent him from getting the benefit of that distress.

*Harris v. Wier* ..... 466

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## EJECTMENT.

1. ACTION of ejectment. Defendant limited his defence to a portion only of the land sought to be recovered, and pleaded an equitable plea to the effect that he had obtained possession of the land in question in a verbal exchange between him and plaintiff's father in consideration of a certain other piece of land transferred by him to the father. Plaintiff replied that the exchange arose out of false and fraudulent misrepresentations of defendant and was afterwards repudiated and cancelled by his father.

It appearing from the evidence that after the exchange both parties immediately entered into possession of their respective lots, that defendant exercised dominion over the land in controversy for fifteen years up to the time of action brought, and including five years subsequent to the exchange during which the father lived, that the father died without ever having made any attempt to reclaim it, that the plaintiff was in possession of the land transferred to his father at the commencement of the action, and that the defendant had not, in fact, made any false or fraudulent misrepresentations as alleged.

*Held*, that his equitable plea was established, that he was entitled to retain all the land transferred to him by plaintiff's father, and consequently that there should be a general judgment in his favour.

The finding of fraud by the jury held unwarranted.

*Bell v. Carruthers* ..... 1

In an action of ejectment defendant pleaded an equitable plea setting out certain deeds as the links in his title. At the trial plaintiff sought to attack one of these deeds on the ground that it was without consideration and a fraud on third parties.

*Held*, that plaintiff should have replied, alleging the fraud, and not having so pleaded could not adduce it in evidence.

The defendant had been for some time in possession of the property in suit, and had made large payments to the parties through whom he claimed, beside outlays in improvements.

*Held*, that having by his plea placed himself under the equitable jurisdiction of the Court he should be protected to the extent of his actual payments and outlays.

*Kinnear v. Harrison* ..... 78

3. W., under whom defendant claimed, entered into possession of a lot of land in 1834, under a judgment recovered against T., in an action of ejectment, and continued in possession for a period of thirty years. In 1846 T. conveyed to the plaintiff, who, in the following year, went upon the land, and had it surveyed.

*Held*, per JOHNSTONE, E. J., DODD, J., and RITCHIE, J., that the entry and survey by the plaintiff were not a sufficient interruption of the adverse possession of W. to prevent the operation of the Statute of Limitations.

*Per RITCHIE, J., SIR W. YOUNG, C. J., dubitante.*—T. having been out of possession and W. in possession under his judgment, when the former made his deed to the plaintiff, no title passed under it.

SIR W. YOUNG, C. J., while concurring with the majority of the Court as to defendant's possessory title, reviewed the conflicting documentary titles of the plaintiff and defendant at length, and referred fully to the township grants in which the property in dispute was included. He was of opinion, under all the circumstances, that there should be a new trial.

WILKINS, J., was also of opinion that there should be a new trial.

*DesBarres et al. v. Shcy* ..... 327

See DEVISE TO EXECUTORS, ALIENAGE, AND TENANT IN COMMON.

## ENCROACHMENT.

See TRESPASS. 5.

## EQUITY COURT, POWER OF, OVER INFANT'S REAL ESTATE.

The power of the Equity Court over the real estate of infants in this Province is more extensive than any such power which has ever been exercised in England.

If it be shown that by the disposal of the property the interest of the infant will be substantially promoted on account of any portion of the property being exposed to waste or dilapidation or being wholly unproductive or for any other reasonable cause, the Court has a discretionary power to order a sale.

Where the whole property yielded an income of only \$100, and the infant's undivided share, upon a sale, would produce four or five times as much as their share of the rental,

*Held*, that the discretionary power of the Court was wisely exercised.

*Held* also, that the discretionary power of the Court to order a sale was not determined by the appointment of a guardian, and that where the guardian, who was the mother of the infants, was opposed to the sale, and neglected or refused to find security as required by *Revised Statute*, (3rd Series,) chapter 124, section 51, the Court had power to remove such guardian, and substitute in her stead a suitable person as next friend to file the necessary bond and effect the sale.

*In Re Estate of Lawlor* ..... 153

## ESTOPPEL.

The note sued upon having been read in evidence at the instance, and on the motion of defendant's counsel,  
*Held*, that he was thereby estopped from denying its validity.

*The Bank of N. S. v. Chipman*..... 438

## EVIDENCE, REJECTION OF.

*See PRACTICE.*

## EXECUTORS, DEVISE TO.

*See DEVISE, &c.*

## EXCESSIVE DAMAGES, HOW REDUCED.

Where the damages awarded by the jury are excessive, but the plaintiff is entitled to recover, the Court in the exercise of their control over the verdict, may suggest a reduction of the damages, or when the suggestion is declined may order a new trial on the ground of excessive damages alone.

*Clarke v. Fullerton* ..... 348

## EXEMPTION OF CARRIERS FROM RESPONSIBILITY.

*See CARRIERS.*

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 OF RAILROAD FROM ASSESSMENT.

The Windsor and Annapolis Railway is a Provincial Railway within the meaning of chapter 45, *Revised Statutes*, (3rd Series), "Of County Assessment," section 16, and is exempt from assessment under the Act.

The true test of exemption depends upon the fact whether the road is or is not a portion of the Provincial Railway.

*The County of Annapolis v. The Windsor and Annapolis Railway Co.*... 397

## FRAUD, FINDING OF BY JURY HELD UNWARRANTED.

*See BELL v. CARRUTHERS*, page 1.

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 . NOTICE OF, AFFECTING PRIORITY OF CONVEYANCE.

*See DEED.*

*See also REPLEVIN.*

## GIFT, INTER VIVOS.

P. gave a young colt to H. P. who lived in his family, but there was no evidence of any delivery to H. P., or of any possession or use of the colt by him. On the other hand P. continued to feed and use the colt as his own until his death, previously to which he gave a bill of sale of it, among other things, to the plaintiff. Some time after the death of P., H. P. sold to the defendant, against whom the plaintiff brought trover. The jury having found in favor of the gift to H. P., it was

*Held*, on a motion for a new trial, that the facts mentioned were not sufficient to constitute a gift *inter vivos*, and that the Judge should have told the jury that no title passed to H. P., instead of leaving it to them to establish the validity of the gift.

*McFurlane v. Flinn*..... 141

## GOLD DISTRICTS, PROCLAMATION OF.

*See PROCLAMATION, &c.*



**GRASS GROWING, CANNOT BE SEIZED UNDER EXECUTION.**

Grass still growing and not yet cut does not come under the description of goods and chattels, and cannot be seized and sold under execution.

*Late v. McLean et al.* ..... 69

**GUARDIAN, REMOVAL OF.**

*See EQUITY COURT, &c.*

**GUARANTEE.**

Plaintiff was applied to by D. J. M., defendant's son, for goods on credit to a large amount. The goods were selected, but plaintiff declined to deliver them unless he was furnished by defendant with a guarantee to cover any transactions which plaintiff might have with the son. The required guarantee was given on October 13th, 1865, between which time and December 31st, 1866, D. J. M. was debited with goods amounting, with interest, to the sum of \$934.04, and credited with payments during the same time amounting to \$726.50. The balance of \$207.54, thus left, was disposed of by being transferred to the debit side of an account with McDonald & Cameron, of which D. J. M. then became a member, and upon the credit side of the latter account several payments were credited to a larger amount than the balance so transferred, at a time when nothing was due from the firm.

To the plaintiff's declaration on the guarantee, defendant pleaded among other things that D. J. M. fulfilled to plaintiff the contract for which defendant became his surety.

*Held*, that the defendant was entitled to judgment.

*Held also*, that the defence set up in the plea was insufficiently pleaded.

Goods having been selected by D. J. M., and their delivery withheld until the guarantee was given, and there being thus material upon which the guarantee might operate in the plain literal meaning of the language contained in it,

*Semble*, that the guarantee applied to the goods so selected, and was not a continuing one.

*McDonald v. McDonald* ..... 136

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*See DENURRER.*

**INEVITABLE ACCIDENT.**

*See TROVER. 1.*

**INFANTS' REAL ESTATE.**

*See EQUITY COURT, &c.*

**INJUNCTION, DISSOLVING.**

Plaintiff having obtained an injunction to restrain the sale of a mining property in which he was interested, the defendants made answer under oath, negating all the allegations on which the plaintiff's claim to relief was founded.

*Held*, that credit must be given to the answer and the injunction must be dissolved (fraud not having been shown,) under the principle laid down in *Clapham v. White*, 8 Ves., 367.

*Hamilton v. Northup* ..... 468

## INSOLVENT ACT OF 1869.

1. T., an insolvent, made a voluntary assignment which he delivered to the interim assignee on the 1st March, who called a meeting of creditors for the 15th March, at which he was appointed assignee of the estate. On the 29th March the insolvent filed with the assignee a deed of composition and discharge, and an advertisement was thereupon published and continued for one month, giving notice of application for confirmation of the discharge. The application was made on May 18th, and the discharge refused on the grounds, 1st, that the insolvent had not deposited the deed with the assignee for the purpose contemplated, nor had the assignee pursued the course prescribed by section 97, Dominion Insolvent Act of 1869. 2nd. That one month's notice had not expired from the first meeting of creditors of insolvent before the filing of and acting upon the deed of composition and discharge as required by section 36. 3rd. That no dividend could be declared until three months after notice of the appointment of the assignee.

*Held*, 1st, that the insolvent, if he saw fit, might waive section 97 and proceed under section 101. 2nd, that if the deed, when filed, had been executed by a majority of the creditors under section 94, there was no reason for delay, as the confirmation itself could not take place before the month had expired. 3rd, that it was not the meaning of section 55 that no dividend could be declared until after the expiry of three months from the appointment of an assignee, but that a dividend might be declared at the end of one month if the assignee had funds.

*Held*, also, that the objections taken merely being of a preliminary character, the insolvent was not entitled to his discharge on failure of the objections, without further enquiry.

*In Re E. D. Tucker, an insolvent*..... 300

2. T. A. and J. A. made application for a discharge in insolvency under the Dominion Insolvent Act of 1869. The principal objection taken to the discharge was that the Act applied to traders only, whereas the insolvents admitted that at the time of its passage they had ceased to be traders. Before the judgment the Act of 1871 was passed, amending the Act of 1869 so as to include parties who, having been traders at the time of the passing of the latter Act, had since ceased to trade.

*Held*, that the insolvents came within the latter Act and were entitled to their discharge, but without costs, they having succeeded on a ground that had no existence when they entered their appeal.

*In Re Archibald et al., Insolvents* ..... 303

3. A writ of attachment under the Insolvent Act of 1859, having been issued at the instance of plaintiff against defendant, the latter, three days before the return day of the writ, procured a rule *nisi* to set the attachment, the writ and other proceedings thereon aside. The rule was taken, among other things on reading the affidavit of defendant sworn before William Aikins, designated as a commissioner for taking affidavits to be used in the Supreme Court, County of Colchester, and the affidavit of Joseph Norman Ritchie, sworn at Halifax before C. M. Nutting, designated as a Commissioner of Supreme Court, County of Halifax. The rule having been made absolute setting the attachment aside, plaintiff appealed on the grounds among others, that the Judge in Insolvency had no jurisdiction to make the order, that the affidavits were improperly sworn, being required by the Act to be sworn by officers appointed by the Court, and that defendant's petition to set aside the writ was premature, in being presented before the return day of the writ.

*Held*, 1st, That the Judge possessed jurisdiction under section 20 of the Act which empowers him to entertain a petition to set aside the writ under the provisions of section 26.

2nd, That from the mere fact of the commissioners acting, there was a presumption in favor of their authority which must stand, until destroyed by evidence sufficient to annihilate it.

3rd, That it was left by the Act in the discretion of the party petitioning, whether he would await the return day or not, the words being, "May petition the Judge at any time within three days from the return day of the writ, but not afterwards." *Quare*, whether the writ could be set aside until actually returned.

The Act providing that the petition is to be heard and determined in a summary manner, "it is for the learned judge to decide what that 'summary manner' of hearing shall be, and as regards the nature and effect of the evidence by which his determination is to be governed, provided it be legal and sufficient evidence."

The learned Judge having proceeded by order *nisi*,

*Held*, that the course was perfectly unobjectionable, whether viewed in regard to the discretion so exercised, or to the nature of the mode of proceeding itself.

A commissioner who is in practice and lawfully recognised by the Court (as would be Akins or Nutting) as an officer legally exercising a function so important, is within the meaning of the words of section 123, "A commissioner appointed by the Court."

*Lang v. Foreman* ..... 546

4. A order *nisi* was obtained from a Judge of the Supreme Court to set aside a writ of attachment in a suit depending in the Insolvent Court. No certiorari or other proceeding had issued to bring the cause up to the Supreme Court.

*Held*, that the proceeding was *coram non judice*. The rule *nisi* was discharged.

*Silver et al. v. Petitmaitre* ..... 551

## INSURANCE, FIRE, AUTHORITY OF SUB-AGENT.

A sub-agent of a fire insurance company has an implied authority, in the absence of notice to the contrary, to receive renewal premiums, such a power being indispensable to the carrying on of the business.

A sub-agent having received a renewal premium, and given a receipt therefor, but accidentally omitted to remit the premium and notify the general agent, and the premises having been subsequently destroyed by fire,

*Held*, that the insured was entitled to recover.

*Gardner v. Home & Colonial Assurance Co* ..... 204

## ———, MARINE,—UNSEAWORTHINESS.

Action on a voyage policy. Plea—unseaworthiness. The vessel sailed from Halifax on the 6th October; on the 7th was found to be leaking, but was readily freed of water; on the 8th was repaired at a marine slip and pronounced thoroughly sea worthy. Proceeded on the voyage next day, but recommenced leaking; was again repaired and resumed the voyage on the 13th. Arrived at the fishing grounds on the 19th, after passing through a severe gale, in which she strained heavily. Was occupied in fishing until the 18th of the following month, when the vessel settled down so rapidly that they were compelled to breach her, and she was sold, bringing a very small sum.

*Held*, McCULLY, J., *dissentiente*, that the evidence of the gale not being well substantiated, and under the other features of the case the verdict for plaintiff should be set aside and a new trial ordered.

Conditions imposed in granting new trial as to costs of the first trial and of the argument.

*Irvine v. The Nova Scotia Marine Insurance Co.* ..... 510

See ADJUSTMENT OF AVERAGE, LOSS, TOTAL OR PARTIAL,  
AND TIME POLICY.

## INSURABLE INTEREST.

In an action for the amount insured under a policy against fire the defendants pleaded over-valuation, want of insurable interest, misrepresentation of title, and false swearing in the preliminary proof. The Judge on the trial reserved the question as to the want of insurable interest, but submitted the other issues to the jury, who found them all in favor of plaintiff, and brought in a verdict for almost the full amount claimed. With regard to the interest of plaintiff, the facts were that he was at the time of the loss in possession of the premises under an agreement to pay for the same by instalments covering six years, he had paid a portion of the purchase money, and had improved the property by various outlays upon it, yet under the agreement he could not have demanded possession until a few days after the policy was signed.

*Held*, WILKINS, J., *dissentiente*, that the plaintiff had an insurable interest, and that the verdict should be sustained.

*Humphrey v. London & Lancashire Insurance Company* ..... 39

## INTENTION, CRIMINAL, INFERRED FROM THE ACT.

Where a prisoner is indicted for feloniously wounding with intent to do grievous bodily harm, the intention may be inferred from the act.

*The Queen v. LeDante* ..... 401

## INTERROGATORIES.

In taking out a rule for interrogatories, a rule *nisi* should be taken, and not a rule *absolute* in the first instance.

*Chambers v. Hunter* ..... 144

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, ANSWERS TO.

*See* EVIDENCE, Rejection of.

## JUDGE, MISDIRECTION OF.

*See* CARRIERS, AND CONTRACT.

## JUDICIAL DISCRETION AS TO ALLOWING AMENDMENTS.

The principle governing the exercise of judicial discretion in relation to allowing amendments is, not to permit them to be made when the effect will be to substitute a question for trial which is substantially different from that which the parties came prepared to try.

*The Bank of Nova Scotia v. Chipman* ..... 438

## JUDGMENT, ACTION ON A.

To an action on a judgment the defendant cannot plead any fact which might have been pleaded as an answer to the original action.

Where a party has obtained a judgment against another he may proceed upon it at common law, and is not compelled to proceed by writ of *revivor*.

The husband of one of several parties against whom a judgment has been formerly obtained stands in no better position than the other defendants, and cannot plead matter of defence to the judgment that was available in the original action.

*Benjamin v. Campbell* ..... 320

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BINDING SUBSEQUENTLY ACQUIRED REAL ESTATE.

Plaintiff recorded a judgment against defendant and issued execution which was returned unsatisfied. Subsequently certain real estate came into defendant's possession by devise from his father. After the expira-

tion of a year plaintiff had this real estate levied upon and sold by the sheriff, purchased it himself, and brought ejectment against a grantee of defendant's who had the possession. He was non-suited on the ground that the sale had not been duly advertized. He then applied for leave to set aside the levy and sale and to proceed anew. Defendant resisted the application on two grounds: 1st, that the judgment did not bind the property because it had been acquired subsequently to the recording; and, 2nd, that the full amount of the judgment debt was not due. This latter ground was supported by affidavit and uncontradicted.

*Held*, that plaintiffs' application should be granted, but the matter was referred to a master to ascertain the actual amount due, plaintiff to have liberty to issue a new execution for the amount if not paid.

*Bent v. Banks* ..... 504

## JURISDICTION OF JUDGE IN INSOLVENCY.

*See* INSOLVENT ACT OF 1869. 3.

## JURY, RIGHT OF THE COURT TO CONTROL DECISION OF.

Wherever the jury decide against or without evidence, the Court will always exercise its right to control them, in order that justice may be done.

*Cox v. Witt* ..... 25

## LACHES.

*See* BILL OF EXCHANGE.

## LANDLORD AND TENANT.

*See* DISTRESS, &c.

## LIMITATIONS, STATUTE OF.

*See* TRESPASS. 4.

## LIS PENDENS, NOTICE OF, AS AFFECTING TITLE.

Plaintiffs purchased from W. M. a quantity of hay described to be growing on a tract of land specified. The hay, when cut, was deposited by permission of W. M. in a barn on the premises. At the time of the purchase a law suit in reference to the ownership of the land was depending between W. M. and the defendant. One of the plaintiffs knew of the suit, and the other that the title was disputed. A verdict having been found for the plaintiffs, a rule was taken out for a new trial, which, it appearing on argument that the defendant had a clear legal title, and possession in law, was made absolute with costs.

*McDonald et al. v. Brodie* ..... 402

## LOSS, TOTAL OR PARTIAL.

Plaintiff's vessel having run ashore, after ineffectual efforts to release her from the rocks where she lay, he gave notice of abandonment which the underwriters refused to accept. They in the interest of all concerned very soon had her removed and repaired at a total cost of \$1300, and then tendered her to plaintiff who refused to take her, and brought suit for the full amount of the insurance. The defendants appealed from the verdict in his favor.

*Held*, that there should be a new trial in which the inquiry should be limited to whether the loss was total or partial; the first question whether there was or was not any loss having been settled by the result of the first trial.

*Delisser v. The Provincial Ins. Co. of Canada* ..... 20

**MALICE, ALLEGATION OF.***See* PLEADINGS, Declaration. 3.**MANSLAUGHTER.**

The defendant, a corporal of the 16th regiment, was tried for the murder of James White, a private of the regiment, and convicted of manslaughter. It appeared from the evidence given at the trial that White, having been placed in confinement, while in a state of intoxication, the defendant with two men were ordered by Stevens, a sergeant of the regiment, to have the deceased tied so that he could not make a noise by shouting and kicking. The order was not executed in such a manner as to entirely put an end to the noise, and a second order was given to tie up the deceased so that he could not shout. In carrying out the latter order Stowe caused the deceased to be placed on the floor, face downward, with his hands cuffed behind his back, a rope was fastened to his feet which were drawn up behind his back, and the rope passed over his shoulders, and across his mouth, and back again to his feet.

*Held*, in reply to two questions reserved for the Court by His Lordship the Chief Justice, who presided at the trial, that whether the illegality consisted in the order of the sergeant or in the manner in which it was carried out, Stowe might properly be convicted.

*Also*, that the jury were justified in finding that the death of White was caused or accelerated by the way in which he was tied by Stowe, or by his directions.

*The Queen v. Stowe* ..... 121

**MASTER, REFERENCE TO A.***See* JUDGMENT.**MISDIRECTION OF JUDGE.***See* CARRIERS, and GIFT INTER VIVOS.**MISTAKE.***See* PROMISSORY NOTE. 3.**MORTGAGES, OUTSTANDING, NO BAR TO PARTITION.***See* PARTITION.**NEW TRIAL.**

1. On the trial a motion was made for non-suit. The Judge inclined to the opinion that plaintiff had failed to establish his case, but not so decidedly as to grant the motion, and it was agreed to withdraw the case from the jury and refer it to the Court. The evidence was very indistinct, and as, in view of the pleadings and circumstances, a judgment could not be given for either party,

*Held*, that there should be a new trial.

*Campbell v. Halliburton et al.* ..... 111

2. New trial ordered where the testimony of the parties was contradictory, and the writings produced corroborated plaintiff, against whom the verdict was found.

*Fullerton v. Chapman* ..... 470

**—————, LIMITATION OF MATTER TO BE ENQUIRED INTO.***See* Loss, Total or Partial.

NOTICE, AFFECTING PRIORITY OF DEED.

*See* DEED.

NOTICE OF LIS PENDENS.

*See* LIS PENDENS.

ORDER, CONDITIONAL.

Charles Prescott, drew on plaintiff in favor of defendant the following order: "Please pay Henry Chapinaw or order the sum of forty pounds currency, payable out of the first moneys received by you on my account." Plaintiff accepted by endorsement in the following terms: "Accepted to pay when I collect a sufficient amount out of Mr. Prescott's debts to pay the same." Defendant claimed that in afterwards adjusting accounts with plaintiff the plaintiff should credit the amount of the order.

*Held*, that without proof of money of Prescott's having come into the hands of the plaintiff he could not be made liable for the amount of the order.

New trial ordered where the testimony of the parties was contradictory, and the writings produced corroborated plaintiff, against whom the verdict was found.

*Fullerton v. Chapman*..... 470

PART OWNERS, LIABILITY OF.

Plaintiffs had for some years furnished outfits and supplies for a fishing vessel of which defendants were part owners. In 1866 it was agreed among the owners that J. McC., one of them, should manage the vessel on his own account, paying all expenses, and that the others should receive certain proportions of the proceeds, but of this agreement plaintiffs had no notice.

*Held*, that defendants were liable for goods supplied by plaintiffs to J. McC. in the usual way after the agreement.

*Ryerson et al. v. Lyons et al.*..... 458

PARTITION.

The plaintiff brought suit for a partition of certain lands under the following circumstances: The defendant and his brother were devisees under their father's will of a large tract of land which they held as tenants in common. They executed two mortgages thereon which were outstanding at the time of action brought. A judgment was subsequently obtained against the brother, and an execution issued, under which his undivided half was offered for sale, and purchased by plaintiff, who received a deed from the sheriff. After the execution of the deed it was discovered that the description therein, as well as in the advertisements of the sale, was erroneous. The plaintiff seeking partition the defendant resisted, and pleaded, 1st, that the brother was still in possession adversely to the plaintiff, and that the latter, therefore, could not maintain an action for partition, not having the possession; and 2nd, that plaintiff ought not to have partition, inasmuch as his application, if granted, would be only nugatory and inoperative, and subject defendant to costs.

*Held*, that the sheriff's deed gave sufficient seizin for a proceeding of partition; that on the trial the title of the judgment debtor might be investigated; that the errors in the description could be corrected by reference the other portions of the description; and that the outstanding mortgages were no bar to the partition sought.

*LeCain v. Hosterman*..... 413

## PARTITION, POWER OF SUPREME COURT.

The Supreme Court of Nova Scotia possesses all the powers with reference to suits in partition with which the Equity Court in England is invested.

*LeCain v. Hosterman*..... 413

## PAYMENT INTO COURT.

Payment into Court does not admit the full claim of plaintiff, but only the liability of defendant to the amount so paid in, and if the plaintiff would recover beyond that amount, he must prove that he is entitled to do so.

*Dodge v. W. & A. R. Co.*..... 537

## PERSONAL CHATTELS. DEFINITION OF.

The phrase "personal chattels" means "only such things as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from place to place," but "does not include choses in action, notes of hand, bonds, and securities for money loaned or due which may be realized by action or suit or otherwise.

*In Re Bank of Yarmouth*..... 308

## PLEADING, DECLARATION.

1. Demurrer to two counts of plaintiff's writ in an action of slander, the innuendo in both counts being that the plaintiff had been guilty of wilful and corrupt perjury. The demurrer was on the ground that the words were not actionable in themselves, and did not support the innuendo.

*Held*, that the counts were good, and that it was for the jury to say whether the plaintiff was warranted in putting the meaning upon them set out.

*Ferguson v. Inman*..... 135

2. Action for deceit on representations of defendant with regard to the sale of a mining property. The declaration alleged that the representations were made by defendant falsely and fraudulently to induce plaintiff to act upon them, and that having acted upon them the plaintiff had thereby suffered loss and damage.

*Held*, on demurrer, that the declaration was sufficient, although it did not contain any allegation that the defendant knew the representations so made by him to be false.

*McKay v. Campbell*..... 475

3. Plaintiff's declaration alleged that defendant had fraudulently represented to B. B. & Co. that plaintiff was about to leave the Province, and that there was reason to fear that B. B. & Co. would lose a debt due them jointly by plaintiff and defendant unless the now plaintiff were arrested, whereupon B. B. & Co. caused the plaintiff to be arrested, etc. The declaration contained no allegation that defendant had maliciously instigated B. B. & Co. to arrest plaintiff, or that they had no reasonable cause for so arresting him, or that defendant knew that there was no reasonable cause.

*Held*, that the declaration disclosed no cause of action.

*Phelan v. Kelly*..... 529

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PLEA.

To an action on a judgment the defendant cannot plead any fact which might have been pleaded as an answer to the original action.

*Benjamin v. Campbell*..... 320

*See GUARANTEE.*



## PLEADING, REPLICATION.

In an action of ejectment defendant pleaded an equitable plea setting out certain deeds as the links in his title. At the trial plaintiff sought to attack one of these deeds on the ground that it was without consideration and a fraud on third parties.

*Held*, that plaintiff should have replied alleging the fraud, and not having so pleaded could not adduce it in evidence.

*Kinnear v. Harrison* ..... 78

## , DEMURRER.

Plaintiffs' declaration contained a count upon a guarantee to a firm given by defendant, and on the faith of which goods were alleged to have been supplied to the person therein named. Defendant demurred, to the count, and it was adjudged bad because it did not thereby appear that the plaintiffs were the persons who composed the firm when the goods were supplied under the guarantee.

*Neal et al. v. Henry* ..... 46

*See* DECLARATION.

## , NON-JOINDER.

Where one of several trustees was sued alone, and there was no plea in abatement.

*Held*, that an objection taken at the argument to the non-joinder of the co-trustees could not avail.

*Zwicker v. Zink* ..... 291

## POWER OF ATTORNEY DETERMINED BY BANKRUPTCY.

*See* ATTACHING CREDITOR.

## POSSESSION, WHAT; REQUIRED TO MAINTAIN ACTION OF TRESPASS.

*See* TRESPASS. 2.

## PRACTICE, AMENDMENT.

On a second trial no amendment adding or substituting a new cause of action or ground of defence will be allowed.

*Rand v. Rockwell* ..... 199

## , AMENDMENTS, ALLOWANCE OF.

*See* PROMISSORY NOTE. 2. AND JUDICIAL DISCRETION.

## , APPEAL FROM DECISION OF JUSTICES OF THE PEACE.

Defendant was prosecuted under chapter 19, *Revised Statutes*, (3rd series), for a breach of the law relating to the sale of intoxicating liquors. There was no actual service upon him of the writ of summons, and the affidavit of the constable verifying the return was informal in being entitled with the surnames only of plaintiff and defendant. Defendant having been convicted in his absence, appealed, and filed the necessary bond under the statute.

*Held*, that when an appeal is taken and perfected from a decision of Justices of the Peace in a summary cause, the judgment below is thereby *ipso facto* vacated, and the case stands for a new trial. Also, that defendant having appealed, and thus virtually appeared, and having avoided the judgment below by having taken an important step in the cause, it was not competent to him to repudiate the jurisdiction of the

Court below on the ground of want of personal service. Had he wished to avail himself of such an objection he should not have appealed, but have sued out a writ of *certiorari*.

On a second trial no amendment adding or substituting a new cause of action or ground of defence will be allowed.

*Per WILKINS, J., dissentiente*.—A judgment given as the judgment in this case was forms no exception to the privilege of appealing conferred by the statute, and to issue a *certiorari* would have been unnecessary. Judgment by default having been given, defendant, not having been duly summoned to appear, is entitled to an appeal. The want of service of the summons alone is ground for reversing the judgment below. A dissatisfied party appealing from a judgment so entered cannot be held to waive his right to contest the validity of the judgment, not having had an opportunity of opposing the claim which the judgment recognizes.

*Rand v. Rockwell* ..... 199

## PRACTICE, BAIL, FILING OF, ON APPEAL

See CONSTRUCTION OF REVISED STATUTES.

### ————, CAUSE NOT PROPERLY BEFORE THE COURT.

Defendant's property was attached by Gordon & Keith under the antecedent Debtors' Act, and subsequently by plaintiff under the Dominion Act. G. & K. applied to have plaintiff's attachment set aside on certain technical grounds. At the argument of the rule *nisi* it was discovered that it had been granted by a Judge at Chambers and was returnable at Chambers, and had been brought on for argument before the Court by agreement between the attorneys.

*Held*, that the application should be refused, the cause not being properly before the Court, and the applicants having no *locus standi* therein.

*Jennett v. Pettimaitre*..... 524

### ————, CERTIORARI.

1. A writ of *certiorari* having been issued out of the Supreme Court to the Chief Commissioner of Mines, the Commissioner declined returning or obeying the writ for reasons which the Court held insufficient, and a rule *nisi* for an attachment was thereupon granted. This rule was opposed on two grounds, the second being that the affidavits on which the rule was granted were entitled in the cause.

*Held*, WILKINS, J., *dissentiente*, that although the writ of *certiorari* had not yet been returned, the matter was already in the Court, and therefore the affidavits were rightfully entitled.

*In Re Clyde Coal and Mining Co.*..... 56

2. After the Court, with full knowledge that a writ of *certiorari* had not been returned, received affidavits on the part of the plaintiff entitled in the cause, and granted a rule *nisi* thereon, and defendant appeared by counsel and resisted the rule upon an affidavit of defendant, also entitled in the cause.

*Held*, that it was too late to raise the objection that the cause was not properly before the Court, and that the Court had no power to adjudicate thereon.

*Rand v. Flavin* ..... 80

### ————, CORPORATIONS, SUITS AGAINST.

The provisions of the *Practice Act* which enable proceedings to be taken in the Supreme Court against a defendant abroad after service do not extend to suits against corporations.

*Belloni v. Sydney & Louisburg Railway Co.*..... 73

## PRACTICE, EVIDENCE, REJECTION OF.

The plaintiff Company, in order to prove a certain notice, called their Secretary, who testified to the loss of the original, and to a sufficient search having been made for it. On cross-examination he stated that he did not know from whom he had received the original, nor in whose hand-writing it was. The paper was tendered, objected to, and rejected, and the Judge also refused to permit the plaintiff then to introduce further evidence to prove it. The plaintiffs also offered answers to interrogatories by one of the defendants, which were on file; and the answer of another of the defendants, which had not been filed, but which was admitted. These were rejected. The plaintiffs thereupon became *non-suit*.

*Held*, WILKINS, J., *disentente*, that the discretion of the Judge, as to the further examination of the witness, had not been properly exercised, that the answers of the two defendants should have been received, and that the *non-suit* should be set aside.

*Windsor Marine Ins. Co. v. Ladd*..... 493

—————, EQUITABLE PLEA, EFFECT OF.

*See* EJECTMENT. 2.

—————, EXAMINATION OF WITNESS.

*See* EVIDENCE, Rejection of.

—————, OBJECTION, WAIVER OF.

*See* CONSTRUCTION OF REVISED STATUTES.

—————, OBJECTION, WHEN TOO LATE TO RAISE.

*See* CERTIORARI. 2.

—————, WITNESS, EXAMINATION OF.

*See* EXAMINATION, &c.

—————, WRIT, SUBSCRIPTION OF.

*See* CONSTRUCTION OF REVISED STATUTES.

## PRESCRIPTION.

*See* TRESPASS. 4.

## PROCLAMATION OF GOLD DISTRICTS.

Cochran's Hill, Sherbrooke, was proclaimed a gold district on June 3rd, 1868. On the 13th of the same month the relator, not being aware of the proclamation, made application for ten acres in accordance with the terms of chapter 25, R. S. (3rd series), section 35, describing the same by metes and bounds. Previous to this, several applications for areas had been made, but none of them gave a description of the areas applied for by metes and bounds. On the 19th June the areas in question were located and given to defendant.

*Held*, that something more is required than a mere proclamation before applications for areas can be made under any other section of the Act than section 36,—areas must be laid off in a particular way, plans prepared, &c.

*Held* also, that the application of the relator was made so in accordance with the spirit and provisions of the Act, as to give him a right to

claim a lease as against prior applicants whose applications failed to comply with the provisions of the law.

*Per* WILKINS, J.—The defendant being in possession under a lease from the Crown, is not to be regarded as a trespasser or intruder on the lands of the Crown.

*The Attorney-General on the relation of Kirc v. McDonald* ..... 125

## PROMISSORY NOTE.

1. The defendant A., at an auction of hay, bid off the unsold portion, estimated at 25 tons, at \$12 per ton, and gave to plaintiff his note for \$300, on the understanding that if the quantity sold fell short of the estimated amount, a proportionate deduction would be made from the face of the note. The quantity having been largely overestimated,

*Held*, that it was competent for the Court to receive evidence of the circumstances under which the note was given to show a partial failure of consideration.

*Fisher v. Archibald et al.* .... 298

2. In an action on a promissory note defendant pleaded several pleas, none of which denied the making or endorsing of the note, or asserted its invalidity in relation to the Stamp Acts. At the trial, before the case was opened, he moved for leave to add pleas under the Stamp Act, asserting in his affidavit that on the morning of the trial he had discovered that the stamps upon the note had not been duly obliterated according to the provisions of the statute, a defect of which he had not been previously aware. The presiding Judge refused his application, subject to the opinion of the Court.

*Held*, that the judicial discretion had been properly exercised, because, 1st, the discovery of the alleged defect in the instrument might have been obtained by due diligence before the trial: and 2nd and especially, because the real question in controversy, between the parties, which they both came prepared to try, had no relation whatever to the validity of the note under the Stamp Acts. The principle governing the exercise of judicial discretion in relation to allowing amendments is, not to permit them to be made where the effect will be to substitute a question for trial which is substantially different from that which the parties came prepared to try.

Although a proper amendment cannot be refused at the trial when circumstances during its progress unexpectedly manifest a necessity for such amendment, principle and convenience alike demand that such a motion should not be entertained in any case during the trial, where, by observing due diligence leave to amend might have been obtained at an antecedent period.

The note having been read in evidence at the instance and on the motion of defendant's counsel,

*Held*, that he was thereby estopped from denying its validity.

The plaintiffs, as soon as the defect in the note was discovered, affixed stamps of double the proper value to it in open Court.

*Held*, WILKINS, J., *dissentiente*, that under section 12 of chapter 9 of the Dominion Act of 1867 they satisfied the requisitions of the statute.

*The Bank of Nova Scotia v. Chipman* ..... 439

3. In an adjustment of accounts between plaintiff and defendants, a promissory note made by defendants in favor of plaintiff was delivered up to them with a receipt in full endorsed upon it and signed by plaintiff. Immediately after the adjustment the plaintiff discovered that a mistake had been made in the settlement, and at once applied to have it rectified. This was refused, and he then brought action on the note. On the trial the defendants produced the note under notice to produce, and the plaintiff having testified that he had put the endorsement on under a mistake, tendered evidence of the mistake itself. The Judge rejected the evidence, and also evidence of what one of the defendants had said when informed of the mistake, and charged the jury that plaintiff's only remedy, if any, was in Equity.

*Held, WILKINS, J., dissentients, that the evidence should have been received, and that plaintiff could maintain an action at law upon the note, as well as proceedings in Equity to rectify the mistake.*  
*Atkinson v. Gould et al.* ..... 482

*See CANCELLATION OF STAMPS.*

*See also USURY.*

PROMISSORY NOTE, FAILURE OF CONSIDERATION.

It is not open to the party liable to impeach the note unless there has been a total failure of consideration, his proper remedy for any partial failure being by cross-action.

*Brundige v. Delaney* ..... 62

REAL ESTATE SUBSEQUENTLY ACQUIRED BOUND BY JUDGMENT.

*See JUDGMENT, &c.*

REASONABLE CAUSE, ABSENCE OF ALLEGATION OF.

*See PLEADINGS, Declaration.* 3

RECORDING OF DEED.

*See DEED.*

REGISTRY OF VESSEL.

*See REPLEVIN.*

RENT, DISTRESS FOR.

*See DISTRESS.*

REPLEVIN.

W. S. and B. & F. S. procured supplies from parties in St. John, N.B., and Halifax, N. S., to be used in the construction of a vessel, which, after her completion, was registered in the name of B. S. To the parties in St. John W. S. and to those in Halifax B. S., whose name alone appeared upon the registry, was represented as owner. Actions were brought by the St. John creditors against W. S. for the goods supplied on his credit, and judgments obtained, and executions issued, under which the vessel was levied upon and sold as the property of W. S. While the vessel was in the custody of the sheriff, and prior to the sale, B. S. executed a bill of sale in the form required by the act to the plaintiff, one of the Halifax creditors, who immediately had the same registered, and received a formal delivery of the vessel from B. S. The sheriff sold all the interest of W. S. in the vessel to defendant and delivered a bill of sale of the same which was not recorded. Plaintiff thereupon brought an action of replevin, which came on for trial, but in consequence of the length of the cause and insufficient time could not be concluded. At the suggestion of the presiding Judge a rule was entered into by which it was agreed that a verdict should pass for plaintiff, with power to the Court to draw the same inferences from the evidence that a jury might do, and either enter a verdict for plaintiff or defendant or order a nonsuit as they might think fit, and also with power to determine the equities, if any, and to order a sale of the vessel and payment of the proceeds into Court to abide judgment.

*Held, First, by Sir W. Young, C.J., DesBarres and Dodd, JJ., (Johnstone, E.J., dubitante, and Wilkins, J., dissentients,) that B. S., being the registered owner, was not precluded by the levy of executions against W. S. from giving the bill of sale to the plaintiff and transferring to the latter a possession sufficient to support replevin. Also, under the authority of Lane v. Dorsay, 1 Oldright, 575, that replevin would lie.*

*Second, by Sir W. Young, C.J., Johnstone, E.J., and DesBarres, J., that the registry of the vessel being only prima facie evidence of*

title, and, there being evidence of fraud and collusion between W. S. and B. S. in regard to the registry, in order to defeat the creditors of the former, that, under the equitable powers conferred by the rule, the parties affected by the fraud should be restored to their just relations to the vessel, and the St. John and Halifax creditors be admitted to a rateable participation in the proceeds.

By WILKINS, J., that to draw inferences of fraud, unless they are irresistible in their character, for the purpose of annulling a registered *prima facie* title to a British ship, is beyond any judicial competency.

By DODD, J., that fraud was not sufficiently proved to avoid the *prima facie* title conferred by the registry.

*Grant v. Robertson*..... 247

## RESCINDING JUDGE'S ORDERS.

The rule against one Judge rescinding an order made by another Judge does not apply to orders which are made absolute in the first instance.

Parties against whom such orders are obtained *ex parte* may apply to have them set aside if irregularly or improperly obtained, especially where they had a right to be heard before the orders were granted.

*Chambers v. Hunter*..... 144

## REVIVOR, WRIT OF.

See ACTION ON A JUDGMENT.

## RIGHT OF WAY.

See TRESPASS. 1.

.....Plea of a private right of way sustained by evidence of a public highway.

See *Comeau v. Leblanc*, p. 13.

## SALE BY BAILEE WITHOUT AUTHORITY.

See TROVER. 2.

## SALE UNDER WARRANT OF DISTRESS.

A constable seized a horse under a warrant of distress and endeavored to sell the same before the return day of the warrant but was prevented from doing so chiefly by the party from whom the horse was taken. Subsequently to the return day the constable sold the horse.

*Held*, that the sale was valid.

*Wheaton v. Francheville*..... 288

## SCIENTER, ALLEGATION OF IN ACTION FOR DECEIT.

See PLEADING, Declaration. 2.

## SETTING ASIDE AWARD.

See AWARD.

## SET-OFF, EVIDENCE OF, EXCLUDED.

See CONTRACT. 1.

## SHERIFF'S SALE, PURCHASER AT.

A purchaser at a sheriff's sale may appoint a third person to receive the deed.

*Scott v. McNutt et al.*.... 118

SLANDER.

See PLEADING, Declaration. 1.

STAMP ACT, THE DOMINION.

The plaintiffs, as soon as they discovered that the note in suit was insufficiently stamped, affixed stamps of double the proper value to it in open Court.

*Held*, that under section 12, chapter 9, Dominion Acts of 1867, they had satisfied the requisitions of the statute.

*Bank of Nova Scotia v. Chipman* ..... 436

STATUTE OF FRAUDS.

Action to recover the price of a certain building, and plea that the contract of sale was not in writing signed by the plaintiff.

The plaintiff gave in evidence that the building in question was erected on land to which neither of the parties claimed title, and that it rested on stone pillars which the plaintiff erected.

*Held* insufficient to give the building the legal character of a chattel, and that therefore the contract was void under the third clause of the Statute of Frauds. Had the plaintiff shewn that the building rested on the pillars solely by its own weight, without being affixed to the pillars or connected with the soil, the case would still have been within the fourth section of the Statute.

*McKenzie v. McDonald* ..... 11

STATUTE OF LIMITATIONS.

See EJECTMENT. 3.

STOPPAGE IN TRANSITU.

Plaintiffs, merchants doing business in Boston, U. S., shipped a quantity of oil to A. & Co., merchants in Halifax, N. S. Between the shipment of the oil and its arrival at the latter port, A. & Co. having become insolvent, but previous to their assignment, for the purpose of protecting the shippers, and without any intention of accepting or taking delivery of the oil, or exercising any control over it on their own account, by a custom house order made before the goods were discharged, transferred the oil, together with the bill of lading, to G. & Co., to be held for and on account of the shippers.

The oil having been claimed by the creditors of A. & Co. under the assignment,

*Held*, that the *transitus* had not been completed, and that the stoppage by G. & Co., acting for the plaintiffs, was good.

*Richardson et al. v. Twining et al.* ..... 261

SUMMARY MANNER OF HEARING, HOW REGULATED IN  
INSOLVENT COURT.

The Insolvent Act providing that the petition to set aside a writ of attachment is to be heard and determined in a summary manner; it is for the learned Judge to decide what that summary manner of hearing shall be, and as regards the nature and effect of the evidence by which his determination is to be governed, provided it be legal and sufficient evidence.

*Lang v. Foreman* ..... 546

## TENANT IN COMMON.

A plaintiff in ejectment proved to be entitled as a tenant in common, and with a defined interest as such, has a right to recover, subject to the rights of the other tenants or their legal representatives, against a stranger, although such plaintiff claims a right of possession to an entirety.

A purchaser at a sheriff's sale may appoint a third person to receive the deed.

*Scott v. McNatt et al.*..... 118

## TIME POLICY, WHAT IS COVERED BY A.

A time policy, unless there be special restrictions, confers the power of sailing from any port, domestic or foreign, and in this Province foreign employment must be understood to be as much in the contemplation of the owner and insurer as domestic use.

*Avon Marine Ins. Co. v. Barteaux*..... 195

## TITLE, AS AFFECTED BY NOTICE OF LIS PENDENS.

See LIS PENDENS.

## ——, WHAT, NECESSARY TO MAINTAIN TRESPASS.

See TRESPASS. 2.

## TRESPASS.

1. Trespass for removing a dwelling-house of plaintiff's, which the defendant did in assertion of a right of way over the ground on which it had been erected. The evidence was conclusive as to the fact of a right of way having been enjoyed by the public over the land in question for a period of over forty years.

*Held*, WILKINS, J., *dissentiente*, that it was thereby proved a public highway common to all the Queen's subjects, and although defendant had relied upon pleas of a private way instead of a public highway, still his defence was substantially good.

*Comau v. LeBlanc*..... 13

2. Plaintiff being owner of a certain lot of marsh land, allowed his son to cut and appropriate the grass growing thereon, which the son did for several years previous to action brought. Defendant owned an adjoining lot, and plaintiff brought trespass against him, alleging that in cutting his own grass defendant had mowed over the division line and into the plaintiff's lot. Two questions were raised by the issues; first, was plaintiff in actual possession of the lot and entitled to the grass? and second, was there any trespass at all committed? The jury found for plaintiff on both issues.

*Held*, that their verdict must be set aside, the evidence clearly showing that plaintiff, although the undisputed owner, had not such possession of the lot at the time of action brought as to entitle him to maintain trespass, and there being nothing to warrant their finding that there had been a trespass committed.

WILKINS, J., *dubitante*.

Wherever the jury decide against or without evidence, the Court will always exercise its right to control them, in order that justice may be done.

*Cox v. Witt*..... 25

3. Plaintiff and defendant were adjoining proprietors, their respective lots being divided by an ordinary post and board fence. This fence was blown down, and defendant employed persons to build a new one, which



differed from the old in that the posts had "shoes." The excavations necessary for the posts and "shoes" were made by defendant partly on his own land and partly on plaintiff's land.

*Held*, that defendant had no right to excavate or build upon the plaintiff's land.

*Hunter v. Ronne*..... 113

4. Defendant's testator in 1831 put plaintiffs in possession of certain premises, without any deed. In 1838 they executed a deed thereof to him in trust for their daughter. In 1859 he devised to defendant all his farm, &c., without excepting the portion given to plaintiffs. Plaintiffs continued in undisturbed possession until 1870, when defendant committed the trespass which was the subject of the present action. He justified under a plea of title.

*Held*, that plaintiffs, having had possession for twenty years after 1838, had acquired a title and could maintain their action.

*Bowen et al. v. Shears*..... 507

5. Defendants removed plaintiff's porch as a nuisance, and justified as being a committee of the City Council duly authorized to remove anything which was a nuisance, encroachment, or annoyance on any of the streets. The evidence showed that the porch, which encroached upon the public street, had been in existence just as it was when pulled down, for a period of sixty years. There was no evidence as to the origin or dedication of the street, and it did not appear whether the porch or the street were the more ancient.

*Held*, that in the absence of evidence as to the original laying out of the street, its dedication to the public should be taken as subject to the encroachment in question, and that the verdict for defendants should be set aside.

*Hagarty v. Pryor et al*..... 523

6. In an action for entering plaintiff's land, breaking open a barn, and destroying contents, plaintiff was clearly proved to have been in possession at the time of the commission of the trespass complained of. A verdict having been found for plaintiff, and a rule obtained to set the verdict aside,

*Held*, that plaintiff being proved to be in possession it was incumbent upon defendant to show by clear and positive evidence that the right of property was in him, and he having failed to do so, the verdict could not be disturbed.

*LeBlanc v. Cutter et al*..... 552

## TROVER.

1. Plaintiff was in the habit of hiring horses and wagons to persons requiring them. During his absence from home his wife, contrary to instructions not to hire horses or carriages in his absence, though the evidence on this point was of a doubtful character, hired to C., one of the defendants, a wagon and several horses to be used in conveying a gold crusher from Fort Hood to River Dennis. While the team was crossing a bridge, driven by D., an experienced driver, who was joined as co defendant, and against whom alone the action was prosecuted, one of the horses received injuries, by getting a leg through the bridge, in consequence of which he died. The plaintiff's writ contained counts in trespass and trover, but the action was treated throughout as one of trover. A verdict having been found for the plaintiff,

*Held*, that there was no evidence of conversion by the defendant D., and that he, being merely the servant of C., ought not to be held responsible for an injury which was admitted to have been an inevitable accident.

*Murphy v. Dulhanty et al*..... 294

2. Trover is maintainable by the owner of property against the purchaser, where a third party to whom the owner has given the use of the property has sold it without authority. The rule is that where there has been a misuser of the thing lent there is an end of the bailment and trover is maintainable.

*Sibley v. Sibley* ..... 325

3. W. C., the master of a merchant vessel, made a voluntary gift to the plaintiff, his daughter, of a spy glass. Immediately afterwards he proceeded on a voyage and was lost at sea. Defendant obtained possession of the glass from the plaintiff, promising to return it to her, but, having been appointed administrator of W. C., of whom he was a creditor, instead of returning the glass he had it appraised and sold it. Plaintiff thereupon brought trover, to which defendant pleaded (1st) denying the conversion, (2nd) denying the property in the plaintiff, and, (3rd) alleging that the glass was the property of the deceased, of whom defendant at the time of the alleged taking and conversion was administrator, and that as such he took and retained, &c. The jury found in favor of plaintiff for \$350 damages.

*Held*, per WILKINS and DESBARRES, JJ., DODD, J., concurring, and SIR W. YOUNG, C.J., and McCULLY, J., dissenting, that plaintiff being in possession at the time of the taking had a clear right, even without title shown, to maintain the action against the defendant who was a mere wrong doer. That the defendant was not a creditor within the meaning of 13th Eliz., chap. 5; but that even had he been such, he, being administrator, could not as such creditor be permitted to impugn the gift, even if the estate were insolvent, and other creditors were proved to exist. That could only be done by the latter or some one of them acting for himself. The question of fraud in relation to a voluntary gift is, in effect, a question of fraudulent intention in the donor's breast existing at the time of the gift.

*Clarke v. Fullerton* ..... 348

Defendant became the lessee of certain premises upon which was deposited a quantity of coal belonging to plaintiffs. Shortly after taking possession defendant served plaintiffs with a written notice to the effect that if they did not remove the coal he would and charge them with the expense of removing. They paid no attention to the notice, and defendant thereupon caused all the coal to be carted away, and the greater part of it destroyed. Some small portion of it was used by his servants.

*Held*, that a verdict in trover for the defendants could not be disturbed.

*Seaman et al. v. Cutter* ..... 455

## TRUSTEE, PERSONAL LIABILITY OF SCHOOL.

The Board of Trustees of Linnenburg Academy, by agreement among themselves ordered through plaintiff, a member of the Board, from a party in Boston, U. S., furniture for the Academy. The person from whom the furniture was ordered forwarded it and drew on him for the amount. Plaintiff advanced \$196 42 to meet the draft, and delivered the furniture up on the assurance that the money so advanced would be repaid to him. The amount required to liquidate the bill was assessed upon the section and collected to the extent of \$146, by defendant, a trustee, and secretary of the Board, but applied by him to other uses.

*Held*, that defendant was liable for the sum of \$146, "It being money assessed and collected, and in his hands for the very purpose of liquidating this demand."

Also, that there being no plea in abatement, the objection taken at the argument to the non-joinder of the co-trustees could not avail.

WILKINS, J. dissented.

*Zwickler v. Zink* ..... 491

## UMPIRE, APPOINTMENT OF.

See AWARD. 4.

## UNSEAWORTHINESS.

See INSURANCE, Marine.

## USURY.

1. Action by indorsee against maker on a promissory note expressed to be for the amount of £40 19s. 3d. Defence—usury. The note had been transferred from the payee to the plaintiff for the sum of £37, it being then overdue, and defendant's liability upon it amounting with interest accrued to £42 13s. 3d. There being nothing to show that the transaction partook in any degree of the nature of a loan, and the jury having found that it was in fact a *bona fide* sale of the note for what the parties considered its marketable value,

*Held*, WILKINS, J., *dissentiente*, that the Usury Act had no application, and that plaintiff should recover the full amount.

*Wheelock v. Chesley* ..... 46

2. To an action on a promissory note defendant pleaded usury. The note was expressed to be for the sum of £40, but the evidence went to show that the defendant actually received only £38, although he paid interest upon the larger amount for the space of two years.

*Held*, that the transaction was usurious, and that plaintiff could not recover.

*Hutchinson v. Dill* ..... 448

## VERDICT, SETTING ASIDE.

Where a verdict is sought to be set aside solely on the ground of its being against the weight of evidence, this Court will seldom disturb it, unless the weight of evidence largely preponderates against it.

*Dewar v. Peardon* ..... 102

## VOLUNTARY CONVEYANCE, BY WHOM TO BE IMPEACHED.

A proved creditor alone can impeach a voluntary conveyance as fraudulent against creditors, though when it is so avoided, it is avoided for the benefit of all creditors. The creditor must put himself in a position to complain by obtaining judgment for his debt, and showing that by the settlement he is defrauded.

*Clarke v. Fullerton* ..... 348

## WIFE'S EQUITY TO A SETTLEMENT.

See ATTACHING CREDITOR.



WYOMING  
STATE  
LIBRARY

СМЕРЬ  
НАШ  
ВРАГ

WYOMING  
STATE  
LIBRARY

QWERTYU  
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ZXCVBN





